

Exhibit 25

Page 1

1 IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT
2 IN AND FOR MIAMI-DADE COUNTY, FLORIDA
3 CIRCUIT CIVIL DIVISION
4 CASE NO.: 2019-017627-CA-01

5 ROBERT A. SUGARMAN, Individually and as
6 Personal Representative of the Estate of
7 MARILYN WENDY SESKIN,
8 Plaintiff,

9 v.

10 JOHNSON & JOHNSON,
11 JOHNSON & JOHNSON CONSUMER
12 INC., f/k/a JOHNSON & JOHNSON,
13 CONSUMER COMPANIES, INC.,
14 and PUBLIX SUPER MARKETS, INC.,
15 Defendants.

16 _____ /

17 Miami-Dade County Courthouse
18 73 West Flagler Street
19 Miami, Florida 33130
20 Friday, February 9, 2023
21 9:32 a.m. - 4:37 p.m.

22
23 This cause came on for hearing before the
24 Honorable William Thomas, Circuit Court Judge, in
25 Courtroom 13-1, pursuant to notice.

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1 (Hearing proceedings commenced at 9:32 a.m.)

2 THE COURT: All right, folks. You all can be
3 seated.

4 Let me tell you what I've been doing. We have
5 our 200 jurors, which is good news. We didn't
6 reserve a courtroom, which is the bad news.

7 So I have been back there trying to contact
8 the judges who did reserve the courtroom to see is
9 your case going, is it not. And I also requested
10 they give us a courtroom -- if no courtrooms are
11 available here, I asked that they give us a
12 courtroom over at the children's courthouse just
13 for jury selection. And nobody can tell me
14 anything right now. So I've been trying.

15 I even went downstairs and I looked at the
16 courtrooms, well, maybe we can use this courtroom;
17 no, that's too small. So that's where we're at.

18 It doesn't change anything for purposes of our
19 pretrial. We still need to do all these pretrial
20 things, but it could potentially impact what
21 happens on Monday.

22 Now, the worst that could happen is that we
23 have 200 people, we keep them downstairs, we bring
24 them up at 25 at a pop, we disqualify all those who
25 can't stay here for the time period that is

1 required -- that gets rid of a lot -- with the
2 thought that we could get down to about seventy
3 people that you all can question, and then we can
4 go from there. But again, I'm talking to you in
5 hypotheticals because I don't know what's going to
6 happen. That was the original plan. So that's
7 what I've been trying to deal with this morning.

8 I get a little frustrated because Andrew, who
9 was an excellent JA, he left, but he knows if you
10 order 200 jurors, you can't do that in this
11 courtroom, so you always order a larger courtroom
12 when you order 200 jurors. And he didn't do it,
13 and by the time it had already been done, all the
14 other judges, the larger courtrooms, the judges are
15 starting trials on the same day.

16 I'll let you know when I know what courtroom.
17 And so, logistically, I don't know if they're going
18 to give us a problem walking 200 people to the
19 children's courthouse. It shouldn't be.

20 All right. Where do you want to start?

21 MR. OLIVER: Well, Your Honor, we were going
22 to hear the motion regarding Plaintiff's motion to
23 exclude Publix's expert. However, as you know,
24 Publix is no longer in this case, so I believe
25 either we pick or they pick.

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1 THE COURT: We start with the plaintiff, then
2 we go to the defendant. We'll go until we've
3 resolved everything.

4 MR. OLIVER: So plaintiff will start with
5 Dr. Permuth, Jennifer Permuth. It's a motion to
6 exclude under Daubert.

7 Do I need to go to the podium, Your Honor?

8 THE COURT: Wherever you're comfortable, sir.

9 MR. OLIVER: Okay. I guess the question I
10 have, I know at the beginning of the last hearing,
11 Your Honor had not had a chance to read some of our
12 paperwork --

13 THE COURT: I did. I got your emails. Thank
14 you.

15 MR. OLIVER: Okay. So you have read the
16 motion to exclude Dr. Jennifer Permuth?

17 THE COURT: I have.

18 MR. OLIVER: Okay. So let me start at the
19 beginning. I'll try to be brief. And obviously,
20 Your Honor, if you have a question, just interrupt
21 me and let me know specifically.

22 Essentially, what defendants would like
23 Jennifer Permuth to do in this case is testify that
24 Dr. Seskin has a gene mutation that increases her
25 risk for ovarian cancer. The problem with that is

1 Dr. Permuth has absolutely no methodology --

2 THE COURT: Counsel, I'm listening to you, I'm
3 just trying to get the computer to turn on.

4 MR. OLIVER: That's okay.

5 And I want to be really clear. She has the
6 genetic testing. The genetic testing mutation that
7 she has is c.456+A>T. That is the mutation that
8 the testing identified.

9 And what the testing said about that was
10 current and limited data suggest women who carry
11 one FANCC mutation may have an elevated risk of
12 developing breast cancer, which we knew, and that's
13 mainly due to BRCA 1 and 2, which Dr. Seskin did
14 not. The next sentence says, "Correlation between
15 FANCC mutations and increased risk of other cancers
16 is not yet known."

17 And Dr. Permuth, at her depositions, agreed
18 that the correlation or the risk between this
19 mutation and ovarian cancer is not yet known. She
20 didn't do that research herself. Nobody has done
21 that research.

22 What she does is she relies on a handful of
23 papers. Those papers are merely talking about this
24 family of genes and saying we need to do further
25 research, and by the way, we've identified some

1 women in the historical record who have ovarian
2 cancer and also have this gene mutation and there
3 may be four or five of them.

4 THE COURT: I'm sorry to cut you off. As I
5 was looking at this, the part of this that -- well,
6 even if that is true, why can't you just point that
7 out during the cross-examination?

8 MR. OLIVER: Well, Your Honor, the reason we
9 can't -- I mean, we could point that in the
10 cross-examination if Your Honor allowed it and if
11 Daubert allowed it, but Daubert doesn't now, under
12 Florida law, does not allow pure opinion testimony.

13 And in fact, if you look at her -- and this
14 part you may not have seen because it was an
15 addendum to her report, but what she wants to say,
16 she wants to couch her opinion in qualifying
17 language that says this could have been suggestive
18 of a substantial causing factor. And she puts it
19 on a risk chart and she doesn't put talc on her
20 risk chart and she says this is the thing.

21 The problem under Daubert is that they have
22 the burden of proving that she has a sound
23 methodology and they have to have something other
24 than her speculative opinion, which this is her
25 opinion, she doesn't have anything to back it up

1 other than --

2 THE COURT: So what you're saying is that it's
3 not as if she's coming in and testifying that she
4 had this gene, and because she had this gene, she
5 is -- it's definitive that she is at a higher risk.

6 MR. OLIVER: That's right.

7 THE COURT: She is saying that, okay, she had
8 this gene and that could have, and the problem with
9 that "could have" is that the research is still
10 undeveloped.

11 MR. OLIVER: That's right. And she admits the
12 research --

13 THE COURT: To a reasonable degree of
14 scientific --

15 MR. OLIVER: She can't say that. And Your
16 Honor has ruled in *Rolle v. Burke*, and I believe
17 that that is not an acceptable opinion under
18 *Daubert*, that's obviously consistent with all of
19 the *Daubert* law.

20 That is essentially where we are with that. I
21 want to be clear about something: Plaintiffs tried
22 to be very narrow with our *Daubert* motions. We are
23 not saying Dr. Permuth can't testify. She does
24 have opinions, for example, about the validity of
25 the talc studies. If she wants to testify to that,

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1 she can. What she can't do is come in and present
2 a risk chart to the jury that says this woman has
3 an elevated risk of ovarian cancer because of this
4 gene when there is literally no science whatsoever
5 that establishes that.

6 And I'll leave you with this: She relies on a
7 paper, a number of papers that talk about this
8 issue. And those papers, at the end of their
9 conclusions, explicitly state we, the authors of
10 this paper, cannot use this -- and they are not
11 about this mutation, about a lot of mutations -- to
12 establish, nor have we tried to establish the risk
13 relationship between ovarian cancer and this group
14 of genes. We haven't done that because we don't
15 have enough information. We need more information.
16 We are saying this should be studied more.

17 And Dr. Permuth, when she was questioned at
18 her deposition, she agreed with that. If we
19 said -- for example, if I wanted to cross her and
20 say, "What is the risk?" She would say, "I don't
21 know." And you rely on this paper, and in this
22 paper, the authors who wrote this paper you rely on
23 say they don't know because they didn't have enough
24 information.

25 So that's where we are on that. It's very

1 narrow. She shouldn't be able to say there's a
2 risk when there's no risk. That's just not true.

3 THE COURT: But does anybody say there's no
4 risk?

5 MR. OLIVER: Yes. Actually, so this is
6 interesting. We questioned defendant's own other
7 experts, and Dr. Felix, who is a pathologist, he
8 was questioned about it. He reviewed the patient's
9 risk factors and said I'm not aware of a genetic
10 risk at this time with this patient. He had the
11 records.

12 There is another one of defendant's doctors, I
13 can't remember if it's Osann or Saenz, who said the
14 same thing, that this is unknown. And this is --

15 THE COURT: Can you help me understand, when
16 you say it's unknown, what I'm trying to understand
17 is that I thought the whole purpose of all of this
18 is that when you isolate this gene, this gene is
19 there, that -- I was going to use correlation, but
20 I don't want to do that. There is no correlation.

21 MR. OLIVER: I can explain.

22 THE COURT: Having this gene alone, does it
23 put you at a higher risk?

24 MR. OLIVER: No. No. Actually, this is a
25 great question. So BRCA 1 and BRCA 2, which your

1 Honor may be familiar with, do raise a woman's risk
2 for ovarian cancer and breast cancer dramatically.
3 And those genes were tested for and Marilyn Seskin
4 was negative for those genes.

5 BRCA 1 and BRCA 2 are related to and part of
6 the FANCC family, which Dr. Seskin had, but within
7 the FANCC family, for women of Ashkenazi Jewish
8 heritage, you have to go down and actually identify
9 the specific deleterious mutation, right? So if
10 you have BRCA 1 and 2, she could absolutely testify
11 to that.

12 She got the testing, and the medical record
13 says, yeah, you got the testing and you have this
14 mutation. That mutation simply means this is a
15 mutation in your gene sequencing that causes some
16 things that interfere with cell regeneration.
17 That's the best I can do as a nondoctor, right.

18 We don't know what that means. We don't know
19 if it leads to cancer. We know in BRCA 1 and 2, it
20 does, but this isn't BRCA 1 and 2.

21 THE COURT: And there's been no additional
22 studies to actually say conclusively it --

23 MR. OLIVER: That's right, absolutely. And I
24 want to read from her treating physician. Her
25 treating physician, her surgeon, defendant cited

1 his testimony in their motion, he said there was
2 further study.

3 Well, when I asked him this question, I said,
4 "To your knowledge sitting here today, is there any
5 research establishing that there is an association
6 between FANCC, the family, and ovarian cancer?"

7 "I'm not aware of any. I know that it's being
8 studied."

9 "So sitting here today, you don't know of any
10 article or study establishing a causal connection
11 between FANCC and ovarian cancer, do you?"

12 "I do not."

13 So I want to leave you with this, Your Honor.
14 You asked, well, isn't this a cross-examination
15 question. You know, defendants could ask my doctor
16 on cross-examination. They could use this genetic
17 testing and say she had this gene mutation. Of
18 course, my expert is going to say she did, I'm
19 aware of it, it doesn't cause a rise in ovarian
20 cancer.

21 I'm not saying they can't use her medical
22 records. I'm saying if they are going to use an
23 expert and offer expert testimony, that expert has
24 to have a solid basis in methodology for her
25 opinion, and in the case of Dr. Permuth, she simply

1 doesn't.

2 THE COURT: So I don't understand. Are you
3 saying that you have no objection to them
4 testifying that she has this unique mutation? But
5 the problem is that you're saying that they can't
6 explain that --

7 MR. OLIVER: I mean, it's a fact that she has
8 the mutation, but --

9 THE COURT: Without explaining what it means,
10 it doesn't have any --

11 MR. OLIVER: That's right. And under Daubert,
12 their burden. They wanted to cross my expert and
13 say she had a gene mutation, and he says she sure
14 did, you know what Dr. Chan is going to say? He's
15 going to say there is no risk associated with that,
16 that we know of.

17 THE COURT: There is no known.

18 MR. OLIVER: And what he'll say,
19 interestingly, you know, he counsels people to get
20 protective surgeries, take oophorectomies and that
21 kind of thing if they have BRCA 1 and 2. He is
22 going to say there is no guidance for me to do
23 that. I can't tell a woman -- if a woman has BRCA
24 1 and 2, I can recommend protective surgeries,
25 which is a huge deal, right.

1 If she has this gene mutation, I can't do that
2 because we don't have an established --

3 THE COURT: All right. Who is responding to
4 this one?

5 MS. SCOTT: I am, Your Honor. If you don't
6 mind, Your Honor, I've prepared a couple slides
7 just to walk us through. It might be because I'm
8 an English major, it's easy for me to have pictures
9 to go with the science. I'll hand this to Your
10 Honor and I have a copy for Mr. Oliver as well.

11 MR. OLIVER: Thank you.

12 THE COURT: All right. Nobody is questioning
13 her qualifications.

14 MS. SCOTT: Yes, no one is questioning her
15 qualifications, and we are going to go a little bit
16 out of order, Your Honor, if you don't mind. I
17 just want to take a step back and do some table
18 setting on what the standard actually is here.

19 So if we turn to slide eight where we talk
20 about our standard, our burden -- non-burden,
21 actually, as a defendant in this case. We don't
22 have the burden to conclusively prove that anything
23 was the cause of Ms. Seskin's cancer.

24 What we are allowed to do under Florida law is
25 to provide an alternative cause, a possible cause.

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1 To say that we have to show some sort of conclusive
2 connection between this genetic mutation and her
3 ovarian cancer impermissibly shifts the burden to
4 the defendants. And as the Third DCA in the Union
5 Carbide Corp. case that I've cited here on the
6 slide shows, that's reversible error. And so if
7 you think about what the standard is under
8 Daubert --

9 Yes, Your Honor.

10 THE COURT: I'm crunching up my face because
11 it's almost like you're saying there is one Daubert
12 standard for the plaintiff and a different Daubert
13 standard for the defense. There still has to be a
14 scientific basis for the opinion. You just can't
15 go and find somebody and say, you have that gene,
16 and this is what that gene generally or what we
17 believe that gene does, and because without any
18 research, without anything, say that's possible;
19 therefore, ladies and gentlemen, you'll find
20 against the plaintiff, find that they didn't meet
21 their burden because they didn't prove -- remember
22 their standard -- within a reasonable degree of
23 medical probability that this injury occurred as a
24 result of this, all because we are saying there is
25 all these other things that are possible, but are

1 you saying these other things are possible within a
2 degree of medical certainty?

3 And if you can't say it within -- if you have
4 somebody saying all these things are possible
5 within a reasonable degree of medical certainty, I
6 agree, but you just can't make it up.

7 MS. SCOTT: And that's not what we are doing
8 here, Your Honor. The Daubert standard applies to
9 both sides equally, right? So they need to be
10 qualified. Undisputed.

11 The only issue is: Is it helpful to the trier
12 of fact? That's undisputed. What is at issue here
13 is her methodology, and she did have a methodology
14 and it was a reliable one. If we point to --

15 THE COURT: No, the only issue here is whether
16 or not her opinion is supported by the scientific
17 community, and what I'm hearing is that everybody
18 is saying that this all needs to continue to be
19 tested. Nobody -- the scientific community is not
20 saying conclusively -- this is what they're
21 arguing -- they are not saying that you can
22 correlate this mutation to a higher risk of cancer.

23 And if you have somebody that says, oh, yes,
24 you can, you can correlate the mutation to a higher
25 risk of cancer, then this is easy. Then I'll deny

1 the Daubert motion, I'll let your expert testify
2 because they don't challenge your expert's
3 qualifications.

4 But they are saying to me -- and I think your
5 paper suggests it as well -- that your witness is
6 not coming in and saying there is a direct
7 correlation. Your witness is coming in and saying,
8 well, these things are possible.

9 MS. SCOTT: She is saying more than it's
10 possible, Your Honor. She is saying it's
11 biologically plausible, which is a term of art in
12 the science. She is also saying that it is
13 biological plausible that it can contribute to
14 her --

15 THE COURT: Here is the only question I asked
16 you: Can she say that that this mutation
17 correlates to cancer within a reasonable degree of
18 scientific probability? Because if she can't, if
19 you're telling me that she can come in and say
20 maybe, possibly, probably, and you're telling me
21 Judge Thomas, that's enough, then I'm going to
22 commit reversible error.

23 If you're right, it's going to be reversible
24 error and they are leading me into it so they can't
25 complain later because there is no way I'm allowing

1 you to introduce evidence that simply says maybe,
2 possibly, plausibly, unless you can say at the end
3 of it, to a reasonable degree of medical certainty.

4 MS. SCOTT: And I think that's ultimately
5 where we get at, Your Honor, because not only is
6 Ms. Permuth basing her opinion on her 20 years of
7 experience in genetic counseling and studying
8 epidemiological studies, there is peer reviewed
9 literature that does support this connection. In
10 fact, we cite excerpts from that literature in our
11 brief.

12 THE COURT: Cite one peer reviewed literature
13 that says there is a correlation between the
14 mutation and cancer.

15 MS. SCOTT: We have cited in our brief the
16 Kobayashi paper, which says that there are
17 mutations of Fanconi Anemia genes, which describe
18 the FANCC mutation that Dr. Seskin undeniably had,
19 that have been demonstrated to cause breast cancer
20 and ovarian cancer susceptibility in cases
21 from non-BRCA 1 and BRCA 2 families.

22 And I do also think it's important to take a
23 step back and talk a little bit about the science
24 because I think it's been glossed over a little
25 bit. As I mentioned, as an English major, it's not

1 my favorite part of the discussion, but if we go to
2 slide four, Your Honor, we talk about what FANCC
3 is. I wanted to pause briefly on that, what the
4 mutation is that she has.

5 It's called FANCC. It's one of 22 genes that
6 make up the Fanconi anemia family or class of
7 genes. And these genes, when functioning properly,
8 they repair double breaks in our DNA that generally
9 occur during the DNA replication process. And so
10 when functioning properly, these genes repair those
11 double-strained DNA.

12 When they're not functioning properly, they
13 don't. And so these Fanconi Anemia genes, like
14 BRCA 1, BRCA 2, there's five -- there's 11 Fanconi
15 anemia genes there are cancer susceptibility genes.
16 There are five that are known to cause ovarian
17 cancer and breast cancer. As Your Honor is aware,
18 BRCA 1 and BRCA 2 are two of those breast cancer
19 susceptibility genes.

20 FANCC has the same pathway. It functions the
21 same way as BRCA 1 and BRCA 2. The only difference
22 is the way that it's inherited. So BRCA 1 BRCA 2
23 are inherited -- I'm taking you back to
24 eighth grade biology class -- BRCA 1 and BRCA 2 are
25 dominant genes, so if both your parents have it --

1 excuse me, if one parent has it, then you can get
2 it.

3 FANCC, which is Dr. Seskin has, is very rare.
4 It's recessive. So both of your parents have to
5 have the recessive gene in order for you to get
6 that mutation. So what the science is starting to
7 establish -- because now BRCA 1 and BRCA 2 have
8 been studied for 30 some-odd years we are just now
9 at the point we have that conclusive connection.
10 FANCC is starting to be studied more.

11 It's not studied as much because FANCC
12 happens -- because it's recessive, it doesn't
13 happen as often as BRCA 1 BRCA 2, but people are
14 starting to study it. Dr. Permuth has studied
15 those studies that are looking at that connection
16 and people are starting to see that yes, there is a
17 connection between FANCC and ovarian cancer.

18 THE COURT: Who?

19 MS. SCOTT: Dr. Kobayashi. There are several
20 other --

21 THE COURT: And I want to know their language.
22 Are they saying things like "there appears to be,"
23 "there is a good chance," like what is the
24 language? Because counsel is representing -- and I
25 didn't look at the studies, I'm being very candid

1 with you, but counsel is saying that at the end of
2 the studies, they are making it clear that more
3 studies need to occur. The science has not
4 basically come to a conclusion in this regard, so
5 that's why I keep asking.

6 I will never be able to counter your experts'
7 expertise in the medical profession. And your
8 expert, like you, can sound so artful when you say
9 it, okay, that's why in my little brain, okay, what
10 I say is I default to what I know: Have they
11 satisfied the standard? Is this something a proven
12 tested methodology?

13 And if it's not, if it's still experimental,
14 if it's still something that is unresolved, then it
15 doesn't satisfy Daubert. I don't care how talented
16 and the qualifications of the person offering it.
17 Daubert requires it to be tested and proven, and
18 that's why I objected to this whole idea of
19 possibilities and plausibility.

20 Because if this was Frye, we would have a
21 whole 'nother conversation, I was saying this the
22 other day with the expert from Publix. What? And
23 because I didn't get it. And that's why I said
24 bring the witness here, let me ask some questions
25 because maybe that will help me understand it.

1 I say the same thing here. But you all don't
2 seem to be in disagreement of your witness'
3 qualifications, you seem to be in disagreement as
4 to where the science currently is. They are saying
5 the science is unresolved and there has been
6 absolutely no studies that you can point to that
7 creates a correlation between the mutation and
8 cancer, higher risk of cancer.

9 You seem to be saying, well, people have
10 looked at this and they are saying that, well,
11 there may be. It's possible. That's what I'm
12 hearing you say. And if that's the best you can
13 say, the motion to exclude your expert in this
14 limited area will be granted.

15 MS. SCOTT: There is the West Valen paper
16 which does say that there is a strong correlation
17 between FANCC and ovarian cancer and breast cancer.

18 THE COURT: And has that been peer reviewed?

19 MS. SCOTT: It has been peer reviewed. It's
20 one of the papers that one of our other experts,
21 Dr. Boyd, who also on this issue has reviewed.

22 THE COURT: Okay. What else? Go ahead.

23 MS. SCOTT: And so when I started out with the
24 standard, I meant on the standard of their claims
25 because that's the way that the Court is looking at

1 our right to defend our position, is to be able to
2 put in alternative cause evidence. And that's all
3 that Dr. Permuth and Dr. Boyd -- who plaintiffs
4 have also sought to exclude on this very issue --
5 are trying to do, is to provide an alternative
6 cause.

7 If plaintiffs get to go up there and say that
8 talc definitively caused Ms. Seskin's cancer, then
9 we are afforded the opportunity to put our experts
10 on and to say, actually, here is another cause,
11 FANCC or her endometriosis or whatever else the
12 case may be.

13 THE COURT: By the way, I don't disagree with
14 that statement.

15 MS. SCOTT: Right. And so under Daubert, we
16 are looking at reliable methodology. And
17 Dr. Permuth has employed a reliable methodology.
18 She has a wealth of experience, unchallenged. She
19 has reviewed peer reviewed literature. She has
20 reviewed Dr. Seskin's medical records, and that,
21 under Florida case law, is reliable.

22 And so as Your Honor asked plaintiffs, the
23 issue here is whatever -- the complaints really
24 here go to the weight of her testimony, not the
25 admissibility. So to the extent they have issues

1 with the correctness of her science, they can
2 cross-examine her on. That's what Daubert
3 instructs, vigorous cross-examination, not
4 exclusion.

5 And one final point, Your Honor. Dr. Permuth
6 herself, I think I heard Mr. Oliver mention that
7 Dr. Permuth admitted there was no connection
8 between FANCC and ovarian cancer in the literature,
9 and that's just not true. She actually testified
10 in her deposition that FANCC mutation has been
11 associated with ovarian cancer, and that based on
12 the scientific literature we are seeing, that FANCC
13 mutations, particularly the one that Dr. Seskin
14 had, are associated with ovarian cancer.

15 THE COURT: All right. Can I ask the
16 plaintiff: I'm looking at this case, R.J. Reynolds
17 Tobacco versus Mack, and the case says, "By
18 excluding appellant's alternate causation evidence
19 on the basis that its expert could not testify to a
20 reasonable degree of medical probability, the trial
21 court improperly shifted the burden of proof as to
22 causation to appellant."

23 And they went on to say that all the defense
24 was trying to do was not prove -- was not to prove,
25 but basically instead they were attempting to

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1 diminish your argument that it was caused by their
2 product.

3 MR. OLIVER: Judge, it's a great question. I
4 litigate a lot of tobacco cases I had this come up
5 in one of my tobacco cases and I'll give you the
6 paradigm that happened in our case because it was
7 very important.

8 This same argument -- Mack, by the way, I
9 think was right at the time that Florida had
10 adopted Daubert. The standard that Mack is talking
11 about does not, per Your Honor's comments earlier,
12 modify the preponderance of the evidence standard
13 the defendants bear to support their expert.

14 In the case I was working on, our expert, in a
15 tobacco case, admitted alcohol consumption can
16 decrease your ability to quit. He admitted that,
17 right? And the judge excluded evidence that our
18 client had an alcohol problem and was consuming
19 alcohol because they didn't have an expert who said
20 I think this contributed to his inability to quit.
21 And the case was ultimately reversed.

22 The difference there is that when our expert
23 admitted that there was this connection, it was an
24 established fact that drinking alcohol reduces your
25 ability to quit smoking within the medical

1 community. What we have here -- so that holding,
2 as Your Honor, I think, recognized earlier, it
3 doesn't modify the Daubert standard. The Daubert
4 standard, which they bear the preponderance of the
5 evidence showing they have reliable methodology,
6 requires them to come forward with something. They
7 can't just make something up and say there is a
8 risk or there is a connection when there's not.

9 We go to Kobayashi. I read the Kobayashi
10 article. There's a lot of stuff in these articles
11 that I don't understand, but Marilyn Seskin's gene
12 mutation is not in that article. This is her gene
13 mutation. This is what Jennifer Permuth says she
14 has, and that is not in Kobayashi.

15 And Kobayashi doesn't connect this gene
16 mutation to an increased risk of ovarian cancer.
17 And Kobayashi doesn't quantify that increased risk
18 of ovarian cancer.

19 Alinozi is another one of the articles that
20 she relied on another one where the authors were
21 perfectly clear that we have identified two
22 instances in a gene database, only two people who
23 had this mutation and had ovarian cancer. And they
24 said if you want to figure out if this is a risk
25 factor, you've got to have a lot of people. I

1 don't know this for a fact, but I understand based
2 on reading the genetic studies establishing risk
3 have to have a lot of people in them.

4 THE COURT: Well, counsel acknowledges it's
5 not as studied as others.

6 MR. OLIVER: Right, but it's not -- there is
7 no study establishing a risk factor. Imagine if
8 the shoe was on the other foot. We have, I
9 believe, 38 out of 40 epidemiological studies
10 showing the connection between talcum powder use
11 and ovarian cancer. That's plenty, right? Under
12 Daubert.

13 But what if my client came in and said, well,
14 people have theorized that this happened, and you
15 said, Mr. Sugarman, how many studies have shown an
16 increased risk? And he said, well, none. Well,
17 that's where they are. None have shown that.

18 Now, where it gets confusing, Judge, is this
19 thing about FANCC. FANCC is a family of genes. It
20 causes another type of cancer that's not ovarian,
21 it's not breast. It's called Fanconi anemia, I
22 believe.

23 The thing is, Dr. Marilyn Seskin didn't have
24 Fanconi anemia. She has that gene family because
25 she is of Ashkenazi Jewish heritage, but that alone

1 is like the first step.

2 THE COURT: I get it.

3 Anything else, ma'am?

4 MS. SCOTT: I think it's worth mentioning,
5 Your Honor, only because Mr. Oliver mentioned it as
6 well about his own expert, his own expert actually
7 testified that he is not absolutely certain that
8 FANCC genes could not contribute to ovarian cancer,
9 and also, coauthored a peer reviewed paper that
10 said that it's plausible that damaging mutations
11 and other genes in that same BRCA family, or same
12 FA family, could confer a risk of ovarian cancer.

13 THE COURT: Do you anticipate he is going to
14 say that on the witness stand?

15 MS. SCOTT: Well, it would be nice.

16 THE COURT: The Court, having heard from all
17 parties, fully considered the arguments of all
18 counsel, the motion to limit the testimony of
19 Dr. Jennifer Permuth is granted. The Court is
20 finding that there is insufficient evidence
21 presented there is a causal connection between the
22 mutation and increased likelihood of getting
23 cancer.

24 What else? Defense motion next.

25 MS. SCOTT: We'll go with Dr. Freidenfelds.

1 So, Your Honor, the J&J defendants have brought a
2 motion to exclude Dr. Lara Freidenfelds.

3 MR. OLIVER: It's Freidenfelds.

4 MS. SCOTT: Freidenfelds.

5 MR. OLIVER: I pronounce everything wrong.

6 MS. SCOTT: Freidenfelds.

7 Plaintiff intends Dr. Freidenfelds, who is a
8 historian who has devoted her career to studying
9 menstruation and reproduction, including pregnancy,
10 to come in and opine on the J&J defendants'
11 corporate practices and their state of mind. And
12 to do this, plaintiffs want to put Dr. Freidenfelds
13 on the stand potentially for days to methodically
14 slog through --

15 THE COURT: Potentially for days?

16 MS. SCOTT: I mean, to slog through a bunch of
17 internal documents to add this historical context
18 to reams of documents. But Dr. Freidenfelds is
19 unqualified to do any of this, Your Honor.

20 She is not a mind reader, so she can't tell
21 the jury what the J&J defendants think or knew or
22 understood about anything. She doesn't have any
23 expertise in anything related to this case.

24 THE COURT: Give me examples of how she is
25 going to read the minds of J&J.

1 MS. SCOTT: She is going to come in, Your
2 Honor, and say that J&J acted -- to read documents
3 and talk about J&J's marketing, and they marketed
4 to women and they marketed saying it was safe and
5 effective. She is going to offer all those sorts
6 of opinions that aim to get in the corporate
7 practices and corporate mind of the J&J defendants,
8 but she doesn't have any expertise in J&J, none in
9 talc, none in cancer, none in any topic that is
10 relevant to this case. Again, she is an expert in
11 menstruation and reproduction.

12 THE COURT: You list here that she is a
13 historian of health, reproduction, and parenting in
14 America.

15 MS. SCOTT: That's from her website. That's
16 how she markets herself. Her expertise, she's
17 written books on menstruation and reproduction.

18 THE COURT: Has she done any work on the
19 history of health and history of reproduction and
20 the history of parenting in America?

21 MR. OLIVER: Yes.

22 MS. SCOTT: Broadly, Your Honor, but broadly
23 being a historian does not qualify you to come in
24 here and tell the jury about J&J's corporate mind,
25 their corporate practices, their advertisements,

1 how those advertisements might have affected women
2 who may or may not have seen them, especially when
3 she didn't speak to any women who may or may not
4 have seen those ads.

5 THE COURT: I know, but if I was to grant
6 this, wouldn't this be the same -- I think about
7 the tobacco cases because that's the only thing I
8 have to draw my experience on when I look at this.
9 But in the tobacco cases, you know, they hire these
10 experts that do stay on the witness stand for about
11 two, two and-a-half days, and they go through the
12 history of advertising with cigarettes, you know.

13 They talk about how they started. They even
14 go as far as to talk about when they started
15 transitioning to this idea of light, when they
16 started advertising to children, where they placed
17 their advertisements.

18 And the experts normally testify that how that
19 increased the number of individuals who started
20 smoking. And that person is just a historian.
21 That person is not necessarily somebody who is in
22 the mind of R.J. Reynolds, okay?

23 Now even though in that case, they do have
24 senate testimony and things like that, and they
25 have the words of the executives -- I don't know if

1 that's in this case -- but you would basically be
2 saying that somebody who is a historian is not
3 qualified to come in and basically outline how your
4 client advertised and what the effect of that
5 advertisement was on people using your product.

6 MS. SCOTT: Your Honor, we are not wholesale
7 saying that historians can't testify. As you have
8 observed, there have been historians in tobacco
9 cases, but those historians were actually qualified
10 to talk about that history.

11 We don't have that here. And don't take my
12 word for I it, take Dr. Freidenfelds' word about
13 it. We asked her about all of this in her
14 deposition. We asked: Do you have expertise in
15 marketing or advertisement, FDA cosmetic
16 regulations, talc or talc mining, Johnson &
17 Johnson, epidemiology, any of these things.

18 I mean, basically what Dr. Freidenfelds is
19 going to -- she is completely unqualified, and just
20 because she is a historian does not mean that she
21 is an expert in the particular history that is
22 relevant here.

23 THE COURT: Well, let's make sure we're clear:
24 Not just a historian, she is a historian of health,
25 reproduction, and parenting in America. I don't

1 know what "parenting in America" means.

2 MS. SCOTT: But she is not an expert in
3 marketing. She is not an expert in Johnson &
4 Johnson. She is not an expert in ovarian cancer.
5 She knows menstruation and pregnancy and generally
6 health, and that's too broad. That's too general.
7 Just being a historian does not qualify you -- a
8 historian of science -- does not qualify you to
9 come in here and tell the jury everything from
10 astrophysics to zoology no more than us having
11 juris doctorates qualifies us to come and tell a
12 jury everything from antitrust to zoning law.

13 She is unqualified. And so what she is going
14 to do, as I mentioned -- if you flip the page to
15 slide four -- she is going to come in here and put
16 a historical gloss on unambiguous documents, even
17 though history is irrelevant.

18 For instance, she wants to tell the jury about
19 how World War I era Johnson & Johnson ads show that
20 J&J persistently marketed their products as pure
21 and safe. She wants to come and talk about Johnson
22 & Johnson's corporate practices and she wants to
23 tell the jury what's in the minds of --

24 THE COURT: Didn't you just agree that you
25 market the product as pure and safe? Are you going

1 to say you didn't market your product as pure and
2 safe?

3 MS. SCOTT: We marketed our product as pure
4 and safe, Your Honor, but we don't need a historian
5 to come in and say -- to talk about ads that say
6 pure and safe to say that we marketed our ads as
7 pure and safe. It's unnecessary.

8 THE COURT: Well, what is she saying about
9 your product that you disagree with?

10 MS. SCOTT: It's not just about our product,
11 Your Honor. She is going to come in here and try
12 to tell the jury -- she is going to read documents
13 and she is going to tell the injury what we thought
14 in the documents.

15 It's in her deposition transcript, which we
16 put here on slide four. She was asked, "Do you
17 intend to testify about what any Johnson & Johnson
18 person was thinking over the course of the '60s,
19 '70s and '80s beyond about talcum powder use and
20 ovarian cancer risk?" The relevant things in this
21 case.

22 She said, "I would testify as to what they are
23 thinking if they wrote it in a document."

24 So by her own words, she is going to come in
25 here, she is going to read documents, and she is

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1 going to tell the jury what to think about them,
2 what inferences to draw, and that is impermissible
3 and improper expert testimony.

4 THE COURT: Let me say this: Are you
5 objecting to these documents coming into evidence?
6 Are any documents that they seek to admit through
7 this witness in terms of documents of statements by
8 Johnson & Johnson, do you object to them on
9 authenticity or any other basis?

10 MS. SCOTT: I'm not sure what documents --
11 particularly what documents she is going to speak
12 about until she gets up, if permitted, to get up on
13 the stand.

14 THE COURT: But you have their exhibit list,
15 right?

16 MS. SCOTT: We do have their exhibit list.

17 THE COURT: Let me ask it another way: We
18 don't have to limit it to this doctor. Are there
19 any documents that they attribute to Johnson &
20 Johnson that you have objected to coming into
21 evidence?

22 MS. SCOTT: I'm sure there are. I can't give
23 you any specifics at this time.

24 THE COURT: Well, the reason I'm asking you
25 that question is because I intend to -- and I

1 haven't heard from counsel yet, but I tend to agree
2 with you. I'm trying to understand that if the
3 document comes into evidence and the document says
4 what the document says, I don't understand why any
5 witness should then be able to say, oh, when
6 Johnson & Johnson says this, this is what Johnson &
7 Johnson means. That, to me, is problematic.

8 However, I don't see a problem with someone
9 saying Johnson & Johnson is advertising this, and
10 then saying based upon that advertisement, that
11 appeals to women who have just given birth, okay?
12 I don't have a problem with that because, again, I
13 think that's a fair correlation.

14 That's not saying what Johnson & Johnson
15 thinks or thought. It's just simply saying, well,
16 Johnson & Johnson did this advertisement, and women
17 basically started -- more women started using their
18 products or trusted their products. I don't have a
19 problem with that.

20 But I do have a problem if they are going to
21 come in and start, as you've indicated, basically
22 trying to get into the mind of Johnson & Johnson
23 about what they were thinking and what they were
24 doing.

25 MS. SCOTT: Yes, Your Honor, and to the

1 hypothetical that you posed, reproduction is not
2 even an issue here. Dr. Seskin never had children.
3 This case is about talc and primary peritoneal
4 cancer.

5 And so she is going to go beyond just looking
6 at advertisements. She is also going to say things
7 like Johnson & Johnson was aware of research
8 demonstrating health hazards. She is going to
9 say -- try to tell the jury that J&J suppressed
10 research.

11 THE COURT: But is that based upon things that
12 are contained -- like is there a basis for her
13 saying that, not her just concluding that, is there
14 something in the record, for example -- and I'm
15 making this up -- is there a memo that you all
16 turned in discovery that says, "We are aware, okay,
17 of the cancer risk of our talc, but we are making
18 lots of money, so let's just keep selling it"?

19 MS. SCOTT: Absolutely not.

20 THE COURT: Now, if that was in there, her
21 testifying that Johnson & Johnson was aware of the
22 risk, well, I don't know what the problem is, and
23 evidence that Johnson & Johnson was aware of the
24 risk is because I have this memo, and this is what
25 the memo says. It's not saying what Johnson &

1 Johnson thought, it's just basically saying Johnson
2 & Johnson says this.

3 And that's what experts do. Experts rely upon
4 opinion, they rely upon hearsay, in order to
5 ultimately come to a conclusion.

6 MS. SCOTT: Your Honor, she is not qualified
7 to do that. It's wrong because that's the invading
8 the jury's function to look at the documents
9 themselves and draw their own inferences and their
10 own conclusions, and to have a purported expert get
11 up on the stand with the imprimatur of an expert,
12 with the imprimatur of a historian come in who is
13 unqualified, give irrelevant opinions that are
14 unhelpful to the trier of fact is improper under
15 the Daubert standard.

16 And so she did not -- she also didn't have a
17 reliable method. She basically cherry-picked
18 documents, and that's on five where we talk about
19 the poisonous fruit from a poisonous tree. She
20 cherry-picked documents from the plaintiffs, she
21 follows the trail of those documents and only finds
22 documents that confirm her unreliable opinions.

23 THE COURT: But is she taking the documents
24 out of context?

25 MS. SCOTT: Yes, Your Honor.

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1 THE COURT: So you mean, like, for example, is
2 she referring to let's say there is a document that
3 has 20 pages and the document speaks to an issue,
4 she is only taking the bad things out of the
5 document and not making any reference to anything
6 within that same document that contextually
7 basically explains why that, quote, unquote, bad
8 thing was said or done?

9 MS. SCOTT: That's what we anticipate, Your
10 Honor, and we anticipate they are going to get
11 out -- the plaintiffs are going to dump Johnson &
12 Johnson documents in through an expert, she is
13 going to give an expert spin with, again, the
14 imprimatur or the endorsement of being an expert,
15 and that's highly prejudicial and it's improper
16 under Daubert.

17 If she is allowed to testify, which we don't
18 think that she should be because she's unqualified,
19 unreliable, it's unhelpful, then we are going to
20 have to spend days going back and putting those
21 same documents in context or showing her other
22 documents that do put those in context. And while
23 we haven't seen that with Dr. Freidenfelds because
24 to my understanding and knowledge, there has never
25 been a historian in any of these talc cases.

1 We have seen that with other experts, like
2 Dr. Plunkett, who we'll talk about later today, who
3 get up on the stand for days, plaintiffs' attorneys
4 use her to dump those documents in, she provides
5 her expert gloss, and then we have to spend days
6 afterwards putting everything into context. All of
7 this can be avoided and it should be avoided
8 because she's unqualified, doesn't have a reliable
9 method, and it's unhelpful to the trier of fact.

10 THE COURT: All right. Let me hear, what do
11 you want to do?

12 MR. OLIVER: Your Honor, let me tell you, it
13 sounds to me like what the defendants want to do is
14 avoid having to cross-examine the witness, which I
15 understand the trial would be quicker if they
16 didn't have to cross-examine Dr. Freidenfelds.

17 First of all, let me be clear, I don't plan on
18 putting her up for days. She actually has multiple
19 sclerosis. It puts her stamina down a little bit,
20 so I'm cognizant of that, and we are not going to
21 have her up for days.

22 Let me just go back to the beginning. We
23 started with Ms. Scott talking about marketing, all
24 right? And what she didn't tell you is that this
25 book, The Modern Period, had a significant portion

1 of it that related to the marketing and use of
2 tampons by women, and what women and consumers of
3 tampons expected out of that product.

4 She teaches marketing courses at Marymount
5 University. She lectures on -- and I had written
6 this down. She lectures on how advertising relates
7 to the ways that people seek health care -- in
8 particular women -- to how they think about their
9 bodies and how they care for their bodies. She
10 looks critically at how businesses work.

11 That's what she's done in her books, that's
12 what she's done in her research. When she was a
13 graduate student, she worked on the research for
14 The Cigarette Century, the guy who wrote that book.
15 She was his understudy for that book.

16 So when defendants say she doesn't have
17 expertise, the first point is you have to take that
18 with a grain of salt because they are just ignoring
19 it and acting like it doesn't happen. She has it,
20 we've put it in, they are not talking about it.
21 That's really point one.

22 Point two is: What is Dr. Freidenfelds going
23 to do? When she said I'm only -- in terms of
24 reading minds or intent, I'm only going to say what
25 the defendants' document says, if you read all the

1 testimony, what she says is, look, I'm not going to
2 stand up and say that Dr. Gavin Hildick-Smith, who
3 wrote a memo that said our minds have asbestos in
4 them, and you know what, if you look hard enough,
5 you can find it in our baby powder too. That's in
6 a memo -- roughly, I'm paraphrasing -- from 1971 or
7 1972.

8 She is not going to say to the jury, and I'm
9 not going to ask her to say: Did Dr. Hildick-Smith
10 and Mr. Lead, did they intend to defraud people?
11 She is not going to answer that question. She is
12 going to say: I can't get into their minds. What
13 I can tell you is I reviewed a historical record of
14 documents and it was sufficient for me to reach
15 opinions about what knowledge the company had, what
16 statements they made consistently throughout a
17 certain period of time, and whether those
18 statements were contradicted by internal knowledge
19 they had, right?

20 She is not going to say what they intended to
21 do; she is going to talk about what they did and
22 put that in historical context. So, for example,
23 how is she going to put it in historical context?
24 One question we would ask is: Well, what was
25 happening in 1971? I just showed you a memo,

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1 Dr. Freidenfelds. Can you tell the jury what is
2 happening in 1971?

3 And she is going to say: Well, in 1971,
4 asbestos had become a big subject, right? Only in
5 the last ten years had people began to understand
6 that asbestos might cause cancer. So there are
7 these scientists out there -- they didn't
8 necessarily work for J&J, they were all over the
9 place -- who were looking for asbestos.

10 So why is that important about this memo?
11 Well, J&J was following this science, right? Their
12 memos showed that they knew this -- and some of the
13 memos say this is a cancer, you know, this is a
14 carcinogen, we know it causes cancer, it might
15 cause cancer, it's needlelike particles.

16 That's the kind of context she is going to
17 offer. She is not going to just repeat what
18 documents say. She is not going to say that any
19 particular person acted with fraudulent intent.
20 She is going to say that the defendants'
21 statements, based on her review of the historical
22 record, were false, right, and they were misleading
23 because they had knowledge that said that wasn't
24 true.

25 She is going to talk about actions they took

1 based on the documents she reviewed. So, for
2 example, to suppress the science and those kinds of
3 things. There are a lot of memos that talk about
4 that too. We are going to get together with our
5 buddies in trade associations and tamp down this
6 tamp down that, and yadda, yadda, yadda.

7 So that's what she is generally going to do.
8 It is not going to take multiple days for our
9 direct. And the basis of everything she is doing,
10 when you set aside her expertise and study that
11 she's done, it's their documents.

12 And they ask her these silly questions at the
13 deposition. Did you review all the documents? And
14 she said, you know what, I have a set of documents,
15 some of those were gathered by the lawyers. When
16 they retained me, they had to give me something to
17 see if I could do this. I looked at that.

18 And we gave her access to Johnson & Johnson's
19 production database in a multi-district litigation
20 for these cases that has millions and millions of
21 documents. And we didn't limit her. We didn't
22 talk to her.

23 They asked her about her search terms that she
24 used to look at that record. And I didn't know
25 what they were, right, and she said I went through

1 all these documents, I reviewed thousands of
2 documents. I would follow the trails. I started
3 here and I did research.

4 I looked at primary sources, secondary
5 sources. This is just the kind of research I would
6 do to write a book or an article.

7 So the last thing -- and I think Your Honor
8 has seen these types of witnesses in tobacco cases,
9 but a Ph.D. in the history of science, I cited a
10 motion because I thought it was important. Ten
11 years ago, I had never heard of that, so I started
12 looking up -- I was like, well, where is a good
13 explanation of what these degrees are?

14 So you go to Harvard's website, where she
15 went. You go to Princeton's website, she didn't go
16 there, but obviously, similar school. History of
17 science is a multidisciplinary approach, and the
18 courses actually say you are going to study
19 geology, biology, chemistry, anthropology, which is
20 what her undergraduate was in, right?

21 You are going to study all of these and you
22 are going to learn to read, synthesize, deal with
23 epidemiology and talk about scientific subjects
24 from a historical perspective, which is exactly
25 what she's doing here. And interestingly, she may

1 be the most qualified witness to talk about this
2 because she personally has focused on women's
3 health issues, and this is a women's health issue.
4 She was aware that women used talcum powder --

5 THE COURT: But what about the question that
6 counsel said, that her testimony is invading the
7 province of the jury? That it's ultimately the
8 jury's decision to conclude -- it's one thing to
9 just put in facts, it's another thing to then tell
10 the jurors what you gleaned from those facts, and I
11 think that's part of what counsel is objecting to.

12 They are saying, well, isn't it that the
13 jury's conclusion? You are using your marker or
14 designation as an expert to tell the jurors this is
15 what you need to think about this statement that
16 they made, as compared to allowing the jurors to
17 come to that conclusion on their own.

18 MR. OLIVER: I mean, there are really two
19 answers to that. First of all, as a legal matter,
20 I think it's 90.703, but it might be 90.702, the
21 Florida case law has been clear for years that
22 testimony should not be excluded because it goes to
23 the ultimate issue, so long as the expert is
24 qualified they can do that.

25 THE COURT: But why is it helpful? In other

1 words, the testimony has to be helpful, and just
2 basically spoonfeeding the jurors -- meaning that
3 the jurors won't be able to synthesize it, the
4 jurors won't be able to understand it, and an
5 expert has to come in and basically synthesize it
6 in such a way that the jurors can basically go back
7 into that jury room and make practical use of the
8 information that came in.

9 MR. OLIVER: And that's exactly what she's
10 doing. In order to understand these documents, in
11 order to understand the context of these
12 documents -- I could go get 20,000 advertisements
13 from Johnson & Johnson and walk through them over a
14 three-week period with the jury and go through them
15 one by one, and they would get the idea, but we
16 would be here for three weeks for just the
17 advertising part.

18 Somebody like Dr. Freidenfelds, with the
19 advertising documents, with the scientific
20 documents can take examples, synthesize that
21 information for the jury, and give them the ability
22 that they need to understand sort of the
23 whole pastiche of what was going on without us
24 simply reading documents to them. And, quite
25 frankly, even if we read documents to them, they

1 don't have the understanding of scientific terms
2 that she has.

3 A great example of one of the things she'll
4 comment on -- we questioned her about this at her
5 deposition -- is disclosures on medical articles.
6 Johnson & Johnson would get people behind the
7 scenes, go write this article, and they would fund
8 the article. And then when the article would come
9 out in a peer reviewed article, it didn't say
10 anything about Johnson & Johnson, it said Dr. Joe
11 Smith, no conflicts.

12 And Dr. Freidenfelds is going to testify I do
13 peer reviewed articles. I understand ethical
14 conflicts. It's one of the things I've done as a
15 historian all the time.

16 Should you be making disclosures if you're
17 getting \$20,000? Absolutely. Why? Well, it shows
18 bias in your study, and that has to be part of the
19 situation.

20 So that's the kind of thing I could show the
21 jurors the document, and without a witness to
22 explain why that matters, they are going to be
23 like -- you know, somebody who doesn't do peer
24 reviewed literature would say, well, what is the
25 big deal? Dr. Freidenfelds is going to explain

1 what the big deal is, right? She is going to
2 explain what the big deal is with regard to these
3 memos that have all this information in it.

4 Like why is that a big deal? Well, it's a big
5 deal because there was this research going on, it
6 was well known at this point that cancer was being
7 caused by this, and you know, average everyday
8 citizens, this wasn't something they were on to,
9 right? And all these ads that we've looked at that
10 continued for 40 years, they all said it was pure
11 and safe, right? And then she applies her
12 marketing expertise --

13 THE COURT: Counsel said something I thought
14 was interesting. Counsel said that there have
15 never been -- I don't know how many of these cases
16 have been tried, but previously, there had never
17 been a historical expert presented in any of those
18 cases, so why do we need a historical expert in
19 this case?

20 And by the way, that includes the case where
21 there was a \$1.6 billion verdict against Johnson &
22 Johnson.

23 MR. OLIVER: I don't think that's accurate.
24 There has been similar testimony to what
25 Dr. Freidenfelds has said, and Ms. Scott actually

1 alluded to it. Dr. Plunkett, who is going to be
2 here, is a toxicologist and she has offered similar
3 testimony to this.

4 There is a Dr. Steinberg -- he is not a
5 doctor. I always want to call him a doctor.
6 Mr. Steinberg, who used to be in this case, but
7 he's gotten elderly and I don't think he does this
8 anymore. But he was in the big verdict, and he had
9 some regulatory background and expertise and he
10 went through some of these documents and explained
11 what they meant and how they were in context.

12 So a lot of different witnesses have done
13 exactly this. When they say there's never been a
14 historian, they just mean that a person with this
15 degree hasn't done it, and what we know from, I
16 think, Kumho Tire from the supreme court, and every
17 court that's followed it because they have to, is
18 that Daubert doesn't rely on that type of
19 schematism, right?

20 We don't require -- tobacco doesn't even make
21 the same argument. We don't require somebody to
22 work for the cigarette company to talk about
23 cigarette design.

24 THE COURT: I want to tell you, the first
25 tobacco case I tried, I had such a problem with the

1 historical expert. I remember -- and the
2 plaintiffs were freaking out because I said --

3 MR. OLIVER: Do you remember who it was?

4 THE COURT: I don't.

5 MR. OLIVER: Was it Dr. Proctor?

6 THE COURT: It's Proctor.

7 MR. OLIVER: Okay.

8 THE COURT: He was on the stand for two
9 and-a-half days, direct and cross-examination, but
10 before he even got up there, I remember saying to
11 the plaintiff, I'm not sitting here listening to
12 somebody tell me what a document says. And I asked
13 them, and I said -- because obviously I did not try
14 the first tobacco case, many tobacco cases have
15 been tried.

16 And so I asked: Appellate courts let him do
17 that? And the reason why I asked that is because
18 it didn't make sense to me that you can just put
19 somebody up there under the auspices of being a
20 historian and we have to sit here and listen to
21 them tell us the history of advertising in tobacco
22 cases and then show documents about, okay, you
23 know, this advertisement, that advertisement.

24 And I just I had such a problem with it. But
25 I acquiesced because the appellate courts of all

1 the tobacco cases that have gone up, they have
2 never stricken the expert. They have never said
3 that that is improper testimony. And I'm inclined
4 to do the same thing in this case.

5 Ma'am?

6 MS. SCOTT: I think, Your Honor, the salient
7 difference between the tobacco cases and the case
8 that we have here is that Ms. Freidenfelds is
9 fundamentally unqualified to offer any of the
10 opinions on any topic in this case. She did not
11 teach a marketing class. She teaches an abortion
12 class where I think she testified that they looked
13 at a marketing website.

14 THE COURT: Counsel said that she actually did
15 marketing and she did research, so are you saying
16 that that representation is not accurate?

17 MS. SCOTT: I'm saying that in her deposition,
18 she said that she was not an expert in marketing or
19 advertisement. She has very little experience in
20 that. She has no experience in talc or primary
21 peritoneal cancer or ovarian cancer or any of the
22 issues --

23 THE COURT: Well, let's just be clear. In the
24 tobacco context, what I remember of Dr. Proctor, he
25 just got turned onto this, and all of a sudden,

1 started researching and collecting all these
2 documents. Somebody delivered all of these
3 documents to him, and he just started going through
4 the documents and then he started putting it all
5 together and then he became the conduit to a lot of
6 these plaintiff cases.

7 But I remember his testimony, how it started
8 was there were all these documents, they were
9 actually going to get rid of them, okay? They were
10 held for a period of time, and he says, I'll take
11 them. And he just started going through all the
12 documents with his research people. That's how he
13 got to the point where he was in his ability to
14 come and present.

15 It wasn't that he had -- he was an executive
16 for the tobacco companies. It wasn't that he had
17 done marketing research on cigarette smoking or he
18 had worked in marketing. It was -- I think -- he's
19 a doctor. I don't know what he is a doctor of.

20 MR. OLIVER: He is a doctor of Ph.D., history
21 of science.

22 THE COURT: And that is what allowed him to
23 come in and do what he did. I'm not sure that this
24 is any different.

25 MS. SCOTT: Your Honor, if I may, I mean,

1 that's not what Dr. Freidenfelds has done. She has
2 not gone and exhausted all the documents and come
3 to any opinions. She has gotten a stack of
4 documents from the plaintiffs' lawyer, she used
5 search terms based on that limited stack, and then
6 she went and confirmed whatever opinions that she
7 had --

8 THE COURT: Ma'am, here is the problem with
9 that argument: One is if she's foolish enough to
10 get on the witness stand and not consider a
11 document that is totally contrary to a position
12 that she's taken, and you then get up there and you
13 say, okay, you read this document? I did. Okay,
14 and you brought out this statement? I did. Go to
15 page 3. Okay.

16 And on page 3, it says, "Although we make that
17 statement, we wholly disavow it because we believe
18 that the safety of our customers are the main
19 focus, and profit over someone's health will never
20 be the benchmark of our success," and you bring
21 that to her attention. The jury gets to weigh
22 that. And they get to weigh whether or not that
23 shows that you were aware of the harmful effects of
24 your product, or whether or not you even, being
25 aware, you decided to do what you do.

1 I really do think this is one of those cases
2 where it has to go to weight rather than
3 admissibility. Your motion to exclude is denied.

4 Plaintiff, what would you like to discuss?

5 MR. PENDELL: Your Honor, I think we are going
6 to discuss Juan Felix.

7 All right. Good morning, Your Honor. Thank
8 you for letting me be here. I'm excited.

9 I want to talk about defense's pathologist,
10 his name is Dr. Felix. Again, this is a pretty
11 narrow motion.

12 A couple things. First opinion, Dr. Felix
13 cannot testify there is a safe level of asbestos
14 exposure. He is not an expert in asbestos
15 exposure. He admits that, he's not qualified to do
16 that.

17 Second, Dr. Felix, in order to bolster his
18 opinion, he says unknown, unnamed thought leaders,
19 so folks he was unable to name, that agree with him
20 that there was no association between talc and
21 ovarian cancer, and also, that asbestos does not
22 cause ovarian cancer. So obviously, Your Honor,
23 it's Hornbook law in Florida that an expert witness
24 cannot take the stand and act as a mouthpiece for
25 other unknown people that he says the experts agree

1 with me without citing the literature, peer
2 reviewed, disclosing the names of these people who
3 supposedly --

4 THE COURT: So he is just going to say there
5 are other people out there that agree with me
6 without identifying who they are?

7 MR. PENDELL: That's correct. And he is going
8 to call them thought leaders. The biggest piece of
9 our motion is his testimony that talc does not
10 migrate from the perineum to the ovaries, and that
11 in-plane particles are contaminants.

12 First, I want to premise this, Your Honor, by
13 saying I absolutely agree that an expert witness
14 can be qualified through experience alone.
15 100 percent true. The problem here is when you
16 delve into Dr. Felix's experience, he does not have
17 the experience to back up that opinion, and here is
18 the reason why.

19 Dr. Felix admitted that in 99 percent of his
20 patients' cases, he never uses this PLM process
21 that he was talking about to look for talc
22 particles. So if he sees 100 patients in a year,
23 99 of them, he does not use this technique to look
24 for talc particles. He does not do it. And this
25 is how you would be able to make a determination

1 about migration and whether it's in-plane
2 contamination.

3 He also admits that with regards to the
4 1 percent of the cases -- so if we went back to my
5 hypothetical, the one out of the 100 times he does
6 look at it using PLM, he acknowledges at the time,
7 before he even goes to look in there, that there is
8 not going to be any talc. That's not what he's
9 looking for and he already knows it's not going to
10 be there. He is looking for something else.

11 He uses this as his entire opinion to say,
12 well, I've never seen it, so therefore, it can't
13 possibly happen.

14 THE COURT: I'm sorry, he is familiar with the
15 test?

16 MR. PENDELL: Correct.

17 THE COURT: And he's testified that he's
18 utilized the test?

19 MR. PENDELL: Correct.

20 THE COURT: Okay. And you are saying that but
21 because when he utilized the test, he wasn't
22 specifically looking for the talc that we are
23 talking about, that somehow disqualifies him from
24 being able to give the opinion about the issue on
25 the issue of migration?

1 MR. PENDELL: Almost. There is one more step
2 in that process. Not only that he wasn't looking
3 for talc, but in the 1 percent of cases where he
4 actually went through this process to look for
5 anything, he knew before he did that process that
6 talc wasn't going to be there.

7 So his opinion is the equivalent of saying
8 gravity doesn't exist because I've never fallen out
9 of a tree. That is what he is saying here; this
10 can't be possible because I've never seen it. I've
11 never looked for it, and I knew when I used this
12 device to look at pathology slides, I knew it
13 wasn't going to be there even before I looked, and
14 based on that, this medical concept is not
15 possible.

16 That is the entire basis of his opinion. It
17 cannot be that he's never tried to look for it. He
18 knew ahead of time when he was looking at these
19 types of slides that it wasn't going to be there
20 and that's not why he was looking for it, he was
21 looking at something else that he knew was going to
22 be there, and he was confirming it through this
23 process.

24 THE COURT: What if he was looking at it and
25 you're right, he excluded it, then he was using

1 this test and he looked at it and he was wrong?
2 You're suggesting that because he's already
3 excluded it, he used the test, but you're saying
4 that if he had seen the talc or he had seen it, he
5 would, what? I mean, what if it was there? And he
6 said he had excluded it, but what if he looked at
7 it in performing a test and it was there?

8 MR. PENDELL: I understand where you're going
9 with that point, Your Honor, but here is the
10 problem with that: 99 out of 100 times, he didn't
11 look at all. So the basis of his opinion is out of
12 100 patients, he looked at one slide and he didn't
13 see it, therefore, it's not possible.

14 He would never be able to -- that would never
15 pass muster if he wrote an article that he tried to
16 submit to a peer reviewed publication for an
17 opinion. That would never pass muster there.

18 THE COURT: But my question though is: You're
19 not saying he wasn't qualified to do the test in
20 the 1 percent that he did, are you?

21 MR. PENDELL: He is a pathologist and he is
22 qualified to use the PLM machine to look for stuff.

23 THE COURT: Then it sounds like fun
24 cross-examination. Get up there and cross-examine
25 on that. That's not me excluding him.

1 Motion is denied. Good argument.

2 MR. BALZANO: I was going to have fun saying
3 some things. Thank you, Your Honor.

4 MR. PENDELL: Thank you, Your Honor.

5 THE COURT: Defense, next motion?

6 MR. BALZANO: I guess we'll do Dr. Sitelman
7 too because Sitelman is our motion on their
8 pathologist.

9 THE COURT: Okay.

10 MR. PENDELL: You might as well just deny this
11 motion too.

12 MR. BALZANO: There is a little bit of a
13 speculation piece. So J&J is moving to exclude
14 Dr. Sitelman, which is plaintiff's pathologist in
15 this case.

16 And so Dr. Sitelman did use the same PLM,
17 which stands for polarized light microscope, and my
18 understanding is it just shoots a light, and if
19 there are certain particles -- like talc, starch,
20 aluminum, silicon, there's a bunch of particles --
21 that when you shoot this light at it, it lights up
22 and they call it a birefringent particle.

23 So fundamentally, we are moving to exclude two
24 opinions that Dr. Sitelman had. Dr. Sitelman
25 looked at a series of -- I think with PLM, he

1 reviewed about 40 pathology slides of Dr. Seskin's
2 tissue and he found a number of birefringent
3 particles.

4 THE COURT: Can I just pause you? You all
5 keep saying something. Are we going to continue to
6 refer to the plaintiff as doctor?

7 MS. STEMKOWSKI: She was a doctor.

8 THE COURT: I know, but she is not a doctor
9 here. She is a plaintiff. So why are we calling
10 her doctor?

11 MR. BALZANO: I'm happy to call her
12 Ms. Seskin.

13 THE COURT: You all keep doing it -- and by
14 the way, both sides are doing it. Just a thought
15 go ahead. I'm so sorry.

16 MR. BALZANO: So Dr. Sitelman, the issue with
17 this is a birefringent particle is not necessarily
18 talc. So he used PLM, he saw birefringent
19 particles, and he is going to now get up here and
20 say that is likely talc. And the kicker here is
21 that you can use --

22 THE COURT: I'm sorry, go back. I'm so sorry
23 because I interrupted you and kind of lost my train
24 of thought. You told me about the light. I'm
25 sorry.

1 MR. BALZANO: No worries.

2 So Dr. Sitelman used the polarized light
3 microscope to look at 40 pathology slides and he
4 saw birefringent particles, and based on that, he
5 is going to say that those particles are likely
6 talc. But the problem here is that is complete
7 speculation there is further tests that you can do
8 with different microscopes, something called the
9 TEM.

10 THE COURT: But does he say why it's likely
11 talc?

12 MR. BALZANO: So he relies on the fact he
13 assumes that it's because of her exposure, and
14 that's about it.

15 THE COURT: He's saying it's likely talc
16 because of the case?

17 MR. BALZANO: Because Mr. Sugarman testified
18 that she used talc. So the kicker is that you can
19 definitively say if it's talc or not. You can use
20 something called TEM, which stands for transmission
21 electron microscopy, and that actually shoots
22 electrons at the particle and tells you the
23 composition.

24 I'm a little rusty, but I believe talc is
25 magnesium. It will literally give you a reading

1 telling you the chemical composition and you can
2 definitively say if it was talc.

3 In this case, plaintiffs could have taken the
4 pathology and given it to another expert,
5 Dr. Rigler, who has done this before. It's called
6 a tissue digestion where you put it in some type of
7 solvent and it destroys all the organic material,
8 and then you take the TEM machine and you look at
9 the particles and you can see if it is actually
10 talc.

11 He didn't do that here, so it is complete
12 speculation to say these birefringent particles,
13 which could be a lot of different things, are talc.
14 And --

15 THE COURT: Are you saying that that's the
16 only way to identify that it's talc, is by
17 performing that confirmatory test?

18 MR. BALZANO: I believe the only way to
19 definitively determine if birefringent particle is
20 talc, or asbestos, any -- to identify what the
21 chemical composition of that particle is, you need
22 to do TEM, or you can use SEM, but it's both based
23 on they shoot an electron and then it gives you a
24 chemical composition of what the particle is. So
25 it's complete speculation for him to --

1 THE COURT: Why wouldn't you just do that? I
2 don't understand.

3 MR. BALZANO: It's a good question for
4 plaintiffs. I'm not sure why they didn't do a
5 tissue digestion or why they didn't use TEM or SEM
6 to say whether or not definitively Marilyn Seskin
7 had talc in her pathology.

8 That leads me to my second point. My second
9 point is not only is Dr. Sitelman going to say that
10 the birefringent particles he saw were likely talc,
11 he is going to say that the talc was from her use
12 of Johnson's baby powder, but there is a much more
13 likely explanation, which it could just be
14 contamination from when they put the slides
15 together at the hospital in Cleveland Clinic. When
16 you take the pathology slides, you need to stain
17 them and put extra cover sheets on it. I'm not
18 really -- I don't really understand the complete
19 process --

20 THE COURT: Why does he conclude that it was
21 from a Johnson & Johnson product?

22 MR. BALZANO: So he basically just rules out
23 contamination because he says that the particles
24 within the same plane as the tissue, but what's
25 funny is -- and Dr. Sitelman agrees to this at his

1 deposition -- there were particles that he found
2 outside the plane of the tissue, and that means
3 that it was from some type of contaminant from the
4 laboratory because as they were putting the slides
5 together, if it's outside the plane of the tissue,
6 obviously it wasn't in the tissue.

7 THE COURT: We don't exclude witnesses because
8 you believe that there may be aspects of their
9 testimony that they didn't properly take into
10 account or properly exclude. That's called
11 cross-examination.

12 I'm going to ask counsel to refer to your
13 first argument. The second one, I will deny that,
14 but as to the first one, I need to hear from the
15 plaintiff.

16 MS. STEMKOWSKI: On why we didn't use TEM or
17 SEM?

18 THE COURT: No, I don't really care why you
19 didn't do it, but counsel's argument is it's
20 basically you're speculating, you don't know what
21 the composition of the product is --

22 MS. STEMKOWSKI: Sure.

23 THE COURT: -- and you didn't do anything to
24 basically discern what is the composition of the
25 product, and you are concluding it's talc, and they

1 are arguing you're concluding that it's talc
2 because you have a case that is based upon talc.

3 MS. STEMKOWSKI: Sure, so I can answer that
4 for you.

5 So basically, Dr. Sitelman did a rule in/rule
6 out diagnosis, like most doctors do. So he said,
7 all right, so there are things that can be
8 birefringent, right? We know it's a pretty small
9 universe, talc is one of them. Starch, sand,
10 calcifications, those types of things.

11 So he looks at her medical records, he looks
12 at the testimony, and he looks at her exposure
13 history, which is something that he can consider as
14 an expert. And so for her entire life, she only
15 used Johnson's baby powder talc.

16 And so he's looking at these slides and he
17 says I identify birefringent particles, so let me
18 see what she could have been exposed to. Okay, so
19 she has a huge exposure to talc, but there's no
20 evidence in the record that she was exposed to
21 other likely birefringent particles. So we have
22 that there.

23 The next thing he has to say is well, it could
24 be contamination, so I need too look at that. And
25 so he did, as Mr. Balzano said, in the plaintiff

1 tissue, right? So with this microscope, super
2 technical, you can basically toggle between
3 magnifications, and he can say based off of his
4 experience -- he's done this thousand of times over
5 40 years.

6 He can say that this particle is appearing in
7 the plaintiff tissue, meaning that it was in her
8 body when it was removed versus out of plane, which
9 he did acknowledge that some of the particles he
10 saw were out of plane. In fact, we are going to
11 show examples of that to the jury so they can
12 clearly see in plane, out of plane. Those things
13 are both true.

14 So he has that. So he says, okay, some of
15 these particles cannot be contamination because I
16 have experience as a pathologist saying this is --

17 THE COURT: I don't want to go into the
18 contamination, I want to stick with the -- so your
19 answer to the question appears to be that he ruled
20 it out by simply looking at what her exposure was,
21 he looked at her medical records, he looked at her
22 history, and he says that, well, this is the only
23 thing that it could be based upon a review of what
24 I know about her?

25 MS. STEMKOWSKI: Well, there is more to this,

1 Your Honor. There is also literature that supports
2 his argument. We cite articles in our motions, one
3 of them is the Johnson article from 2020, which I
4 have here, in which they do a test -- and PLM is
5 one of them -- and the scientists are looking for
6 talc in women's genital tissue. So they are able
7 to characterize how talc looks under PLM
8 microscopes.

9 THE COURT: Did he testify that he looked?

10 MS. STEMKOWSKI: Yes, so he did that. So he
11 says that these particles are consistent with what
12 the literature has found talc looks like in her
13 tissue. So the literature supports him, he
14 ruled in, ruled out --

15 THE COURT: Why didn't he just do --

16 MS. STEMKOWSKI: Well, let me tell you, Your
17 Honor, it is incredibly expensive. Very expensive.
18 Actually, in our other case we have in Sarasota
19 County, we did that testing and they still say it's
20 contamination.

21 So we would have spent all this money to have
22 an expert conclude, in fact, the other case found
23 talc, and they still say it's a contaminant. So it
24 would not move the ball forward one way or the
25 other for our case in our opinion.

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1 But here, we have an expert who is qualified
2 to say more likely than not, I believe this is
3 talc.

4 THE COURT: Anything else?

5 MR. BALZANO: For just the point on the
6 differential diagnosis, the point I think Your
7 Honor gets it differential diagnosis, you don't
8 have some type of machine that you can go that can
9 spit out the exact diagnosis. Dr. Sitelman had
10 that here, or Dr. Rigler could have done that for
11 him. He says he's an expert, that's another point.

12 And then also, for the cited article, Johnson
13 2020, Dr. Sitelman is not qualified. He doesn't
14 have experience. He hasn't made a career of
15 identifying talc. He's a pathologist. He hasn't
16 made a year of identifying talc using PLM.

17 And also --

18 THE COURT: All he's saying is it's
19 consistent -- meaning that if there's medical
20 literature out there and you go to a doctor and the
21 doctor refers to the medical literature and then
22 the doctor looks at the slides and he says, well,
23 this is consistent with what the medical literature
24 says, why is that not a fair reason for concluding
25 that it was talc?

1 MR. BALZANO: I think I'll just go back to the
2 TEM. He had -- again, it's not like it's a
3 differential diagnosis.

4 THE COURT: No, I agree. First of all, I
5 agree with. I think that they may say it was
6 expensive, they may say I don't know what he's
7 going to say when asked about that, but again, I
8 don't think based upon what you all have presented
9 that this is a basis for me to exclude the opinion
10 testimony.

11 MR. BALZANO: And I'll say one more thing
12 about contamination. I know you don't want to hear
13 about contamination, but I think there is an
14 important point that I really want to talk about
15 with Dr. Felix. I think we should talk quickly
16 about it.

17 When talc or any particle, when any foreign
18 particle is lodged in a live person's tissue, there
19 is a foreign body response that triggers
20 inflammation. And the point here is although
21 Dr. Sitelman says, well, it's not contamination
22 because it's in the same field, it's in the same
23 surface as the pathology, as the tissue, there was
24 no foreign body response. And that's why there was
25 no inflammation encasing the particle. And that's

1 why it was most likely contamination, because if
2 you look at the particles and the contaminants on
3 the ones that clearly no one disputes --
4 Dr. Sitelman does not dispute --

5 THE COURT: Who says that?

6 MR. BALZANO: That there's foreign body --

7 THE COURT: No, that it's most likely
8 contamination? Because you said there was no
9 inflammation, okay, so you're saying the conclusion
10 is that it's most likely contamination. Says who?

11 MR. BALZANO: Dr. Felix, and there's a couple
12 of studies. There's at least one textbook -- well,
13 it's basis of pathology that -- I don't want to get
14 too much into Dr. Felix's opinion, but it's the
15 basis of pathology that when there is a foreign
16 particle, your body does everything it can to get
17 that particle out. It has a response.

18 That's why the FDA, in 2016, there's no more
19 powders. It's not just talc, it's corn starch,
20 it's all types of powders that's not supposed to be
21 in your body. The FDA, in 2016, said that there
22 shouldn't be powder on surgical gloves anymore
23 because it causes -- when a surgeon is operating in
24 live tissue, it causes inflammation. It causes a
25 foreign body response.

1 And here, when you look at the pathology
2 slides, there was no foreign body response. When
3 you pair that with the fact that when you look at
4 the slides, the particles outside the plane, so it
5 looks like there was some type of contamination at
6 least on the slides that are not on the plaintiff
7 tissue --

8 THE COURT: But the point that I want to add
9 is that -- and I'm not suggesting that you're
10 wrong. You may be absolutely correct.

11 The question though is that you're asking me
12 not to allow him to present his conclusion because
13 you have evidence that suggests that his conclusion
14 is wrong.

15 MR. BALZANO: Right. Well, because it goes to
16 the fact that it's an unreliable methodology. It
17 is unreliable to look at a pathology slide when all
18 of the physical evidence you see shows you that it
19 is contamination. There is no foreign body
20 response, you see contaminants on different, you
21 know, parts of the slide not in the plaintiff
22 tissue. The fact that he could have --

23 THE COURT: I'm sorry, I don't know anything
24 about this, so how do I exclude it by saying that
25 it was obvious, this doesn't support it. I just

1 think it has to go to the jury and you do your best
2 at your cross-examination and hope you land some
3 punches.

4 It's denied. What else from the plaintiff?
5 I'm still trying to get my computer logged on.

6 MR. OLIVER: We'll do Boyd.

7 MS. STEMKOWSKI: Your Honor, we have
8 plaintiff's motion to exclude Dr. Boyd. Do you
9 want to take a minute?

10 THE COURT: No, go ahead. I can listen.

11 MS. STEMKOWSKI: This is actually going to be
12 very straightforward for you, Your Honor.
13 Dr. Jeffrey Boyd we are seeking to exclude only a
14 specific cause opinion, and this is in the same
15 vein as Dr. Permuth. You've already excluded
16 Dr. Permuth's opinion --

17 THE COURT: Who is arguing this for the
18 defense?

19 MS. SCOTT: I am, Your Honor.

20 THE COURT: Okay. Go ahead, ma'am.

21 MS. STEMKOWSKI: So Dr. Permuth has been
22 excluded correctly in a CC opinion. Dr. Boyd
23 intends to offer the same opinion, but with less.
24 So during his deposition, he said that --

25 THE COURT: I'm sorry, he is going to offer

1 the same opinion with less, is that what you said?

2 MS. STEMKOWSKI: That's what I said.

3 THE COURT: Okay. Go ahead.

4 MS. STEMKOWSKI: So during his deposition, he
5 said that the FANCC gene could be considered
6 suggestive of the cause of primary peritoneal
7 carcinoma, but then he went on to say that he would
8 not be comfortable saying it is more likely than
9 not that this particular mutation was the cause of
10 Dr. Seskin's primary peritoneal cancer.

11 So he has said I can't said more likely than
12 not, I can said it's suggestive. And I would say,
13 Your Honor, that if Dr. Permuth can't come in here
14 and said that it's suggestive, neither can
15 Dr. Boyd.

16 So -- but I want to go a little bit further
17 with him because I think that defendants are going
18 to say, well, Dr. Boyd is also a molecular
19 epidemiologist and he can talk about FANCC and the
20 Ashkenazi heritage and he provides more context.
21 But if you again look at the literature that he is
22 citing to support his opinion, it does not support
23 his opinion.

24 And, in fact, he says, "I would say that there
25 is insufficient literature at this point to put

1 FANCC gene in the same category as, for example,
2 the BRCA 1 and 2 genes in terms of a very high
3 degree of certainty in terms of the causal
4 relationship."

5 THE COURT: So what literature is he relying
6 upon to support his opinion if it's insufficient
7 literature?

8 MS. STEMKOWSKI: Right, so he cites five. So
9 he has five articles he identifies during his
10 deposition, and I want to read to you from those
11 articles so there is no confusion what they say.

12 One of them is the Frey article, and that
13 says, "Although some studies have demonstrated
14 FANCC heterozygous mutations to marginally increase
15 the risk of breast cancer and early pancreatic
16 cancer, other studies have failed to demonstrate an
17 increased cancer risk, and to our knowledge, there
18 are currently no risk reduction guidelines
19 associated with that finding." That's one.

20 The second is the Pan article, and that's
21 actually aimed at identifying the germ line
22 mutations at FANCC and high-risk breast cancer
23 patients in China. It is not about ovarian cancer,
24 it is about breast cancer. It is not studying
25 ovarian cancer in the slightest.

1 The third is the Westphalen case, and that is
2 looking at potential therapeutic responses to
3 cancer based on genetic defects. Nowhere in any of
4 these studies is there a sentence that says FANCC
5 causes ovarian cancer or has been suggested as an
6 increased risk. It does not exist in those five
7 articles and, Your Honor, for that reason, his
8 opinion has to be excluded.

9 THE COURT: You did the deposition?

10 MS. STEMKOWSKI: Yes.

11 THE COURT: How does he come to the conclusion
12 that at least it's suggestive?

13 MS. STEMKOWSKI: Sure. So I have no
14 scientific background, so it's in the family, as
15 Mr. Oliver was saying. FANCC is in the same family
16 as BRCA 1 and BRCA 2 and the Fanconi anemia family,
17 and he says that it is a deleterious pathogenic
18 mutation that affects how someone's genes can
19 replicate if damaged.

20 So he says that, okay, if she is -- this gene
21 is in the same ovarian cancer susceptibility
22 family, although it is not one of them, and it has
23 a similar background in what it does, right? So it
24 affects how genes replicate.

25 And so the theory being, I think, is that if

1 there is injury to a gene, it cannot fix itself. I
2 think. And so he takes that and he says FANCC is
3 suggestive of ovarian cancer.

4 And again, he is attempting to offer medical
5 causation opinion and he cannot say more likely
6 than not that it can do so.

7 THE COURT: Response?

8 MS. SCOTT: Yes, Your Honor.

9 So Dr. Boyd has been studying the BRCA 1,
10 BRCA 2, FANCC family of genes for 30 years. He's
11 been setting up laboratories. He's really a
12 pioneer. He's been on the forefront of this.

13 And what Dr. Boyd did was he, using that
14 extensive experience studying these genes, he
15 looked at the 22 Fanconi anemia genes, saw that
16 five of those genes -- as we talked about earlier,
17 BRCA 1, BRCA 2, three others -- breast cancer and
18 ovarian cancer susceptibility genes, increased
19 risk. Again, FANCC, they are parallel. Same
20 family, same function. FANCC causes other sorts of
21 cancers, and now, peer reviewed studies are
22 starting to establish that FANCC also causes
23 ovarian cancer.

24 And I just want to correct my friend on the
25 other sides here, that Westphalen case that

1 Dr. Boyd relied on actually says, under results,
2 "We identified a strong correlation between
3 elevated alterations in a core set of
4 HRR-associated genes beyond BRCA 1, BRCA 2, such
5 as," and then references FANCC, "particularly in
6 breast, ovarian, pancreatic, and prostate cancer."

7 So this article is one that Dr. Boyd
8 explicitly relies on strong correlation. He also
9 uses his over 30 years of experience researching
10 these specific genes to come to his opinion that
11 the FANCC mutation that Dr. Seskin indisputably had
12 was a suggestive cause of her cancer.

13 Now, he doesn't have to come in here and say
14 it's more likely than not. I mean, we looked at
15 the case law, Your Honor, and we looked at Mack,
16 and it said that excluding alternative causation
17 evidence on the basis that the expert could not
18 testify to a reasonable degree of medical
19 probability improperly shifted the burden to the
20 defendants -- it's not our burden -- and that's
21 reversible error. And the Third DCA agreed with
22 that.

23 And so we don't have to prove more likely than
24 not, we just have to prove a reliable method. And
25 he employed a reliable method. And a reliable

1 method means it's more than speculative, it's more
2 than conjecture, and that is what we have here.

3 And plenty of cases that we've cited in our
4 papers say experience, just experience and
5 reviewing medical records is enough. Here, we have
6 even more than that. We have these peer reviewed
7 articles, one of which establishes a strong
8 correlation.

9 So even though the science, as we talked about
10 earlier, is evolving, there is a sufficient
11 basis --

12 THE COURT: But what did he do -- other than
13 the peer reviewed article, what did he do to come
14 to that conclusion separate and apart from the peer
15 reviewed article?

16 MS. SCOTT: He has studied this family of
17 genes, so he has his background knowledge.

18 THE COURT: I guess tell me, when he's asked
19 the question and he's going to opine that there is
20 a suggestive correlation, without looking at the
21 peer reviewed article, how does he come to that
22 conclusion?

23 MS. SCOTT: He comes to the conclusion based
24 on the science, Your Honor. Based on the fact that
25 BRCA 1 and BRCA 2, which are, again, known -- they

1 cause ovarian cancer, okay? He is going to look
2 and see that FANCC, which functions the same way,
3 does the same thing, repairs those double breaks in
4 the DNA, and if they're not repaired, they cause
5 cancer, FANCC does cause cancers, and the strong
6 correlation is now emerging that it's also
7 connected to ovarian cancer. By looking at those
8 parallels, those two genes that function the exact
9 same way, he expects it is a -- he expects, as the
10 literature is confirming, that FANCC --

11 THE COURT: But I don't understand.

12 MS. SCOTT: -- is a suggestive cause.

13 THE COURT: See, that's my point though.
14 Where is it at in terms of the research? Meaning,
15 has somebody -- has anybody ever done anything to
16 basically be able to come in and say that this is a
17 cause?

18 Because -- the only reason I'm saying that is
19 because you can get an expert -- and I'm not saying
20 this is your expert -- but you can get an expert to
21 say anything you want them to say and then you can
22 go out there and find somebody that wrote an
23 article. So the question is that -- and I love the
24 language that you all are using, suggestive. I
25 don't even know what that means. What does that

1 mean, it's suggestive?

2 MS. SCOTT: Likely. He says what it means in
3 his deposition, possible, likely, suggestive. It
4 suggests a cause. It suggests that it is a cause
5 of her ovarian cancer.

6 And the article that I have read to you, Your
7 Honor, establishes that strong correlation. And so
8 there is a basis, and that's all that we need. We
9 do not need to prove the science. No science is
10 provable, right? Like, I mean, it's tested, but I
11 mean, science is evolving art.

12 THE COURT: You are absolutely right, but when
13 was the first Johnson & Johnson case?

14 MS. SCOTT: I believe in 2017.

15 THE COURT: 2017?

16 MS. STEMKOWSKI: 2014.

17 THE COURT: 2014. And in that time -- but
18 people started studying this whole issue of --

19 MS. STEMKOWSKI: 1980s.

20 THE COURT: -- of whether or not the powder
21 basically caused ovarian cancer not in 2014, right?

22 And so my question is: Are you really telling
23 me since 1986, and we are now in 2024, that no
24 scientific literature, no scientist has been able
25 to correlate with any reasonable degree of

1 certainty that the talc actually causes the ovarian
2 cancer? I'm sorry.

3 MS. SCOTT: I can answer yes to that question.

4 THE COURT: To that one, right.

5 But my point in saying that is it's
6 uncomfortable -- maybe that doesn't matter -- but
7 it's uncomfortable to be here 38 years after the
8 literature began, and the most you can say is that
9 there is an article that is suggestive.

10 MS. SCOTT: The article is strong correlation.
11 I can show you the article. I can pull it up and
12 show it to you. It says there is a strong
13 correlation.

14 But the issue is that because FANCC is not --
15 it's not in a large population of people, it's just
16 not studied as much, but it's now being studied
17 because of the parallel between these known ovarian
18 cancer and breast cancer genes. And let's be real,
19 Your Honor. People weren't really studying BRCA 1
20 and BRCA 2 the way they are now because it was a
21 women's health issue, and now people are focusing
22 more on women's health, and the natural progression
23 is now we're looking at these other genes in the
24 same family.

25 THE COURT: I know, but the point though is

1 that isn't there supposed to be more, when we're
2 talking about Daubert, aren't we supposed to be
3 able to say there is this understanding within the
4 scientific community? It's not a situation where
5 we're saying, well, we have four doctors who say
6 this, and four doctors who say that, and then you
7 say, oh, well, there's an understanding, there is
8 an acceptance within the scientific community.

9 Well, no, there is no acceptance within the
10 scientific community. It's still being studied.
11 Nobody knows the answer.

12 And so I don't think in a court of law, if
13 it's still being studied and no one knows the
14 answer, I don't think, under Daubert, you get to
15 come in and say, well, some people say that there
16 is a correlation.

17 MS. SCOTT: And Your Honor, that's not what
18 we're saying. The community, under Daubert, is not
19 the entire scientific community. It's the
20 scientific community that's dedicated to this
21 particular issue.

22 And the scientific community that is looking
23 at these issues -- because these are the papers
24 that we've cited. These are the papers that our
25 experts have relied on. This scientific community

1 is establishing this link.

2 THE COURT: So your doctor, if asked, is it
3 the universal understanding within the scientific
4 community that there is -- is there a universal
5 opinion within the scientific community that what
6 you are opining today is accepted?

7 MS. SCOTT: I think that his specific -- in
8 his community of people, there would be people in
9 the community that would say yes.

10 THE COURT: That's not the answer to my
11 question, because you can always find people in
12 your community that --

13 MS. SCOTT: That's the relevant community,
14 Your Honor.

15 THE COURT: You're right, and I'm not saying
16 that, but are there people in the community that
17 say it's not?

18 MS. SCOTT: No, Your Honor. They might say
19 that it's inconclusive, but there is no one -- and
20 plaintiffs have cited no studies -- where someone
21 has said absolutely not, can't happen, zilch, no
22 way.

23 All the articles that we have cited have said
24 it's possible. Everything from it's possible,
25 we're looking more into it, to a strong

1 correlation. And Dr. Boyd is part of that
2 community. He is a leader in that community.

3 THE COURT: Okay. So you're telling me that
4 in the community that we are talking about, if he
5 is asked the question, he would say that there is
6 still more studies that need to be done because
7 it's not conclusive within our community?

8 Because there are medical professionals that
9 will tell you, okay, you know, what is the standard
10 for when you are replacing a knee, okay? And they
11 would tell you -- and by the way, you ask any of
12 the orthopedist professionals that testify, they
13 will all say this is the standard procedure that
14 you use. It's not experimental, it's not
15 hypothetical, this is what you do.

16 What I'm hearing from you is that, yeah, there
17 are people that think it's inconclusive. There are
18 people who think it's possible. Some may even
19 think there's a strong likelihood. But within the
20 scientific community, there is no common
21 understanding in terms of the way it occurs.

22 And so my question is: If there is no
23 understanding within the community -- and I'm
24 accepting it to be the community that your doctor
25 is a part of -- how does that satisfy Daubert?

1 MS. SCOTT: Your Honor, I'm not saying that
2 there is no understanding within the community.
3 The community are the people who have researched
4 it, and the people who have researched it have said
5 there is a potential link. From potential link to
6 strong correlation. No one inside this community
7 is saying it's not possible.

8 THE COURT: No, they're not saying it's not
9 possible, but they're saying it's inconclusive.

10 MS. SCOTT: When you asked me about the
11 community, I was thinking more -- I'm sorry, that's
12 my fault, I was thinking more generally.

13 When I'm talking about the community of people
14 who are actually studying these issues, there
15 are -- the community of people studying these
16 issues are observing and starting to establish a
17 link. And yes, there is a gradation from a
18 potential link -- and we've cited the papers -- to
19 strong correlation.

20 THE COURT: So when do we get to a point where
21 it would be -- so you're saying that as long as
22 someone in the community says it's possible, it
23 satisfies Daubert? Just by saying it's possible,
24 that's enough for an expert to come in and testify
25 that that satisfies Daubert?

1 MS. SCOTT: Daubert requires a reliable
2 methodology, and that's what Dr. Boyd said. When I
3 speak about possibility --

4 THE COURT: Wait a minute, let's do all of
5 Daubert. Daubert requires a reliable methodology
6 and it has to be based upon something that is
7 generally accepted within the scientific community.

8 That's why I keep asking you: Is it generally
9 accepted in the scientific community or is it just
10 something that maybe the small group of people that
11 you were able to find says it's possible?

12 Because that's the part that I'm struggling
13 with. Because if we start just basically going on
14 a scientific community -- by the way, if this was
15 Frye, we wouldn't be having this conversation,
16 right? It would be one of those things where
17 almost anyone can come in and say anything, and
18 your doctor would have been able to come in and say
19 that.

20 But everybody said no, we don't want to use
21 Frye, we want to use Daubert, at least here in
22 Florida, okay? So the court said we are going to
23 use Daubert and they said this is what is required.
24 And one of the things that is required is, yes,
25 reliability of methodology, but also, it has to be

1 something that is based upon -- that is generally
2 accepted within the scientific community to which
3 the expert belongs.

4 I suggest to you that that hasn't been
5 satisfied because it's still being studied. Nobody
6 really knows. And what happens if tomorrow there
7 is a study, someone writes a paper and says that we
8 researched this, and originally it was
9 inconclusive, now we're saying there is a less
10 likelihood that it causes ovarian cancer. Because
11 that's the problem with possible.

12 (Telephone interruption.)

13 THE COURT: This is Judge Simon about your
14 courtroom. I'm going to take it only because it's
15 about your courtroom.

16 (Discussion off the record.)

17 THE COURT: All right. We got 6-1. We don't
18 have a problem.

19 Go ahead, ma'am.

20 MS. SCOTT: Your Honor, I do believe that it's
21 generally accepted within this community that
22 studies these issues that FANCC is a suggestive
23 cause of ovarian cancer. Now --

24 THE COURT: Can I ask another question?

25 MS. SCOTT: Yes, Your Honor.

1 THE COURT: Do you have a case where the trial
2 court either excluded it or allowed it, and then an
3 appellate court opined on the decision of the trial
4 court? Because this is not the first Johnson &
5 Johnson case, right? These cases have been tried
6 all around the country, right?

7 MS. SCOTT: That's correct, Your Honor.

8 THE COURT: And this is not a new issue,
9 right? So has this been -- I always like to get
10 guidance from what other people have done -- not
11 trial judges, they make errors like I do. But
12 appellate courts, we all got to listen to them,
13 right?

14 And so if appellate courts have spoken to what
15 a trial judge did and said, well, judge, you should
16 have allowed this, or judge, you should not have
17 allowed this, is there any guidance that you have
18 in that regard?

19 MS. SCOTT: Not from an appellate court, Your
20 Honor, but Dr. Boyd has been able to testify in
21 talc trials on other genetic mutations based on
22 his, you know, unchallenged qualifications and his
23 reliable method.

24 THE COURT: All right. Anything else?

25 MS. SCOTT: I mean, I think, Your Honor, just

1 thinking about, again, the standard, Dr. Boyd used
2 a reliable method. We don't have to come in here
3 and prove -- excuse me, we don't have to come in
4 here and disprove cause.

5 We have the right to present evidence of an
6 alternative cause, and that's exactly what Dr. Boyd
7 is going to do, and it's not so out of step with --
8 it's not out of step with the literature.

9 THE COURT: I'm going to ask them the same
10 question.

11 Can I ask the plaintiff: Are you aware of any
12 case law that -- because counsel is arguing -- and
13 I want to be consistent. If you're going to make
14 an error, make the same error consistently through.

15 But counsel is making the argument that it
16 satisfies Daubert because no one is questioning the
17 qualifications of their expert, and the literature
18 supports the conclusion that this is suggestive,
19 that there is a link towards ovarian cancer. So?

20 MS. STEMKOWSKI: Sure. So I'm not aware of
21 any decision in the United States where Dr. Boyd
22 has been overturned, but he's also never brought
23 this opinion about FANCC in another court.

24 THE COURT: He's never done that?

25 MS. STEMKOWSKI: Not on FANCC. He has opined

1 in other talcum powder cases on genetics, but not
2 on FANCC. Not to my knowledge.

3 THE COURT: Is there a difference between
4 other genetic testimony that he would provide and
5 FANCC?

6 MS. STEMKOWSKI: Well, sure. If he came in,
7 Your Honor, and he said that BRCA 1 causes ovarian
8 cancer, that's genetic testimony. He would be
9 absolutely able to say that because that's what the
10 literature says. BRCA 1 is linked to ovarian
11 cancer.

12 But the difference here is that the literature
13 on FANCC, it's the potential link, it's possible,
14 it's suggestive. And they do have a burden by a
15 preponderance of the evidence to establish the
16 alternative cause. They just can't come in here,
17 like you said earlier, and say, well, I think it
18 might be this.

19 And we have one article where it's the strong
20 correlation, but what you notice is it's breast
21 cancer, ovarian cancer, pancreatic cancer. There
22 is no -- let me back up.

23 BRCA 1 and 2 is a 20 to 30 percent increased
24 risk in women. If they have that, that is the
25 increased risk. There is no piece of literature --

1 THE COURT: That even assigns a percentage to
2 the risk.

3 MS. STEMKOWSKI: Exactly. And I want to point
4 out a couple more things, Your Honor. Their own
5 experts disagree with him.

6 So Dr. Saenz is another expert that we did not
7 Daubert, but she is probably going to come. And
8 she said during her deposition, at present, there
9 is no conclusive evidence that FANCC mutation
10 increases your risk of developing ovarian cancer.
11 That's her deposition at 150, lines 11 through 15.
12 Dr. Felix, the pathologist that you just heard
13 about at page 59, lines 12 through 17, he agrees.

14 And, you know, I want to just repeat that when
15 I asked him at his deposition, well, what does the
16 literature say, Dr. Boyd? "I would say that
17 there's insufficient literature at this point,
18 insufficient data to put the FANCC gene in the same
19 category as, for example, the BRCA 1 and 2 genes in
20 terms of a very high degree of certainty in terms
21 of the causal relationship."

22 He is saying himself that the literature is
23 not there. He is taking pieces of literature and
24 he is saying if we look at it like this, we can say
25 there is a risk. And that is insufficient for

1 Daubert.

2 THE COURT: Anything else, ma'am?

3 I tend to agree. The motion to limit the
4 opinion of Dr. Boyd is granted. Thank you.

5 MS. STEMKOWSKI: Thank you, Your Honor.

6 THE COURT: All right. Defense, I think we
7 are up to you.

8 MR. CARUSO: Motion to exclude Dr. Ness, Your
9 Honor. Joe Caruso for the defense.

10 THE COURT: I'm just laughing because you all
11 are challenging everyone's expert.

12 MR. CARUSO: All right, Your Honor. I would
13 like to focus just on a few pieces in our motion.
14 More specifically, I'd like to talk about Dr. Ness'
15 failure to look at the specific disease that
16 Dr. Seskin had in this case, which is primary
17 peritoneal cancer.

18 Dr. Ness' analysis, as is true for all experts
19 in plaintiff's case, look at ovarian cancer, which
20 is a clinically similar -- treated in the same
21 way -- cancer to ovarian cancer, but are different
22 from an etiological standpoint, and that's borne
23 out in the literature, and Dr. Ness didn't even
24 attempt to address this literature.

25 THE COURT: I'm sorry, she didn't have ovarian

1 cancer?

2 MR. CARUSO: She had primary peritoneal
3 cancer, which has a different ICD code. It's a
4 different cancer. They are similar, but they are
5 similar in the sense that they are treated the same
6 way, and from a clinical perspective, doctors tend
7 to voice them in similar breaths because they are
8 treated the same way.

9 But we are not here to talk about her
10 treatment, we are here to talk about what caused
11 her cancer, and from that perspective, they are
12 different. What plaintiffs point to to say, no,
13 no, no, they are the same, let's forget about that
14 there's no literature that's tying talc to primary
15 peritoneal cancer, which is a cancer of the stomach
16 lining as opposed to the ovary. They say let's
17 forget about that, Dr. Ness says it's the same
18 thing.

19 Well, Dr. Ness, how do you say that? Let's go
20 to their own motion. This is the testimony that
21 the plaintiffs point to to say that it's the same
22 thing.

23 This is what the plaintiffs point to for
24 Dr. Ness to disregard the primary peritoneal
25 literature and focus on ovarian.

1 "Question: You were asked some questions
2 about different types of genital cancers earlier?

3 "Answer: Yes.

4 "Question: And when you refer to epithelial
5 ovarian cancer, did you include in your analysis
6 thinking of fallopian type cancer?

7 "Answer: Yes, I did.

8 "Question: Do you also include in your
9 definition of epithelial ovarian cancer peritoneal
10 cancer?

11 "Answer: Yes, I do."

12 Cited just her deposition testimony. She has
13 no methodology, no reliable methodology to go to
14 and point to literature saying that talc use is
15 associated to primary peritoneal cancer. It's only
16 associated under their theory of the case with
17 ovarian cancer and it's not acceptable under
18 Daubert.

19 THE COURT: Did you ask that question? Did
20 you take the deposition?

21 MR. CARUSO: I did not.

22 THE COURT: Okay.

23 MR. CARUSO: So as Your Honor just said, when
24 you have an expert and you're talking about FANCC,
25 when nobody knows the answer, it's still being

1 studied, cannot come in here and say that there's a
2 correlation.

3 This is being studied. We have three peer
4 reviewed literatures in 2007, 2015, 2020, that
5 show -- and I can grab them for you here if you
6 want -- that say there is a difference in the
7 etiology, in the causes of these cancers. We
8 looked at them, they have different risk factors.

9 And if Dr. Ness came in here said, yeah, I
10 looked at those, I disagree with them for XYZ
11 reason, that's a different discussion. She didn't
12 even address them. That's unacceptable under
13 Daubert.

14 MS. O'DELL: Good morning, Your Honor, Leigh
15 O'Dell for the plaintiff. I feel like I've been
16 dressed up for a long time and this is the first
17 time I've gotten to say something.

18 Let me take this on and begin by talking about
19 Dr. Ness' qualifications because I think it's
20 helpful here. Dr. Ness has been studying the issue
21 of talc and ovarian cancer since before 2000. She
22 has been a primary researcher on some of the
23 studies, the epidemiological studies that consider
24 the question of is there a connection, a causal
25 link between the genital use of talc and ovarian

1 cancer.

2 And in those studies, when you look at the
3 defined number of women who have cases -- in other
4 words, they have cancer -- what the researchers do,
5 they include not only ovarian cancer, but fallopian
6 tube cancer and primary peritoneal cancer. That's
7 part of the disease pelvic carcinoma. And
8 the Levanon article is one of the articles we cited
9 in our papers.

10 It defines it as those diseases are all the
11 same because they are right there in the same area
12 from a physiological perspective. Researchers now
13 believe that epithelial ovarian cancer to include
14 fallopian tube, and primary peritoneal starts in
15 the fallopian tube and the cancer seeds it from the
16 fallopian tubes there to the ovaries and into the
17 peritoneal cavity, which is right there.

18 And so what Dr. Ness said is I considered
19 those together, and that's supported by the
20 literature. And that was what her -- when you say
21 she's not considered primary peritoneal, it's
22 really -- I don't think it would be accurate
23 because she studied it for 24 years and she's been
24 part of the ovarian cancer research coalition that
25 has studied --

1 THE COURT: What counsel said is that it's
2 different. Cancer of the stomach is different --
3 I'm saying stomach.

4 MR. CARUSO: Stomach lining.

5 THE COURT: Stomach lining is different from
6 cancer of the ovary. And so the question you seem
7 to be saying is that, no, no, no, because they are
8 all in generally the same area, they just lump them
9 all together, and all of the research that applies
10 to ovarian cancer equally applies to this cancer
11 that your client died from, or suffered from.

12 MS. O'DELL: She did die, sadly.

13 And if I could be say this, Your Honor, this
14 is not cancer of the stomach. Primary peritoneal
15 is just not cancer of the stomach, so we --

16 MR. CARUSO: Abdominal lining.

17 MS. O'DELL: With respect to my colleague, I
18 mean, let's just be clear, that's not what we're
19 talking about.

20 We are talking about a pelvic carcinoma
21 disease of those three entities because they are
22 essentially contiguous. So Dr. Morrissey,
23 Dr. Seskin's treater, Ms. Seskin's treater, he says
24 they have similar etiologies, similar treatments,
25 similar outcomes.

1 When you look at the literature itself, which
2 is cited in Dr. Ness' opposition to this motion,
3 one of the studies that the defendants will spend a
4 lot of time talking about is the O'Brien study.
5 And it looks at certain cohort studies, and when
6 they look at the cancers they are studying, and
7 it's an epithelial ovarian cancer study, but when
8 they look at those cancers, they are looking at
9 fallopian tube, primary peritoneal, and ovarian
10 cancer. They are all taken together. And that's
11 the data that's considered in order to evaluate --

12 THE COURT: So are you telling me there is no
13 particular study or research as it relates to the
14 specific type of cancer that your client suffered?
15 It's all linked to ovarian?

16 MS. O'DELL: No, sir. I'm saying that all of
17 the 40 studies that considered the causal
18 connection between talc and ovarian cancers, refer
19 to it, include primary peritoneal cancers because
20 they are considered a part of the same disease.
21 That's what I'm saying.

22 When you look at -- and I can list study after
23 study. The O'Brien study. The Kramer study, which
24 was published in 2016. As a part of that disease
25 set, they include ovary, fallopian tube, and

1 primary peritoneal.

2 THE COURT: But is there any research that
3 speaks separately as to the type of cancer that
4 your client suffered from?

5 MS. O'DELL: The body of literature that we
6 are relying on is the 40 years of 40 studies that
7 includes primary peritoneal --

8 THE COURT: I know, but I don't want to just
9 talk about the literature that you're relying upon,
10 I want to talk about literature that exists.

11 MS. O'DELL: In terms of the studies that
12 focus on this -- and I just want to point out a
13 couple other things for the record. Dr. Morrissey,
14 from a cellular perspective, they are the same;
15 from a treatment perspective, they are the same;
16 and histologically, their serous subtype is what
17 Dr. Seskin says, and they are all a part of that
18 serous carcinoma. So the literature --

19 THE COURT: How are they different?

20 MS. O'DELL: They are essentially only
21 different to the degree you have those millimeters
22 from the fallopian tube and the ovary to this --
23 we're talking about if the fallopian tube is here
24 and the ovary is here, we are talking about the
25 lining that's right here. And so when you think of

1 epithelial ovarian cancer as a disease group --
2 they call it pelvic carcinoma as well -- they are
3 all a part of the same disease set.

4 So to somehow for the defendants to argue that
5 the 40 years of literature that studied this
6 disease as a pelvic carcinoma, they don't apply to
7 primary peritoneal is absolutely inconsistent with
8 the science, it's inconsistent --

9 THE COURT: But counsel said he had articles
10 that actually speak to the differences.

11 MR. CARUSO: Yes, and I can distribute that if
12 you want. This is the Jordan study. In the bottom
13 section of the abstract on the left-hand side --

14 THE COURT: I'm half blind and you give me
15 this print that's like 10 font.

16 Okay, go ahead.

17 MR. CARUSO: I can read it. At the bottom
18 there on the left-hand side, "The strikingly
19 similar patterns of risk for serous ovarian and
20 fallopian tube cancers, and the somewhat different
21 results for primary peritoneal cancer suggest that
22 peritoneal cancers may develop along a different
23 pathway." That is Jordan 2007.

24 I'm going to pass out now Sorenson 2015,
25 another peer reviewed piece of literature. Reading

1 again from the conclusion here, "In contrast,
2 observed differences in risk profile,
3 clinicopathologic and prognostic factors as well as
4 in the molecular patterns indicate that peritoneal
5 cancer and ovarian cancer may be linked to
6 different carcinogenic pathways."

7 I'm going to hand out Fortner 2020, another
8 peer reviewed piece of literature. Conclusion of
9 this paper, which by the way, Dr. Osann, in her
10 report, notes as evidence of the differences
11 between these different types of cancers.

12 "Ovarian, fallopian tube, and primary
13 peritoneal cancers appear to have shared and
14 distinct etiological pathways, although most risk
15 factors appear to have similar associations by
16 anatomic site."

17 So that's when you were asking earlier, what's
18 the difference, right? They are close to each
19 other, that's essentially how they relate them to
20 each other. They tend to metastasize in the same
21 area.

22 I should have noted this while we were
23 discussing Jordan a few moments ago. Jordan looks
24 at talc specifically, right? So they say, okay,
25 let's take all of -- as counsel previously pointed

1 out, a lot of the literature, despite the
2 representation, they don't go in their method
3 section and say we counted ICD code 10.9, 10.1,
4 whatever. Because they do have different ICD
5 codes, primary peritoneal, ovarian, fallopian; they
6 are distinct cancers.

7 But interestingly, Jordan looks at the
8 distinct cancers and they looked at when they could
9 use perineal or genital use of talc. And they
10 broke it down and they said, okay, we see no
11 increased risk for primary peritoneal cancer. We
12 see a slightly increased risk for ovarian cancer,
13 again, suggestive of different etiologies between
14 these two cancers.

15 You see in that particular study a slight
16 increase for ovarian cancer. You do not see that
17 for primary peritoneal cancer.

18 And another thing to note, Your Honor, is when
19 you go to accredited websites, the American Cancer
20 Society, they note on their website the differences
21 between these cancers. One of which, obviously, in
22 my opinion, points to the fact that they are
23 different cancers. Men can get primary peritoneal
24 cancer. Men can't get ovarian cancer. They are
25 different cancers.

1 And their own expert, Dr. Sitelman, in his
2 deposition says, yes, if you look at them under a
3 microscope, they are both serous type cancers, so
4 they come from the same cell, but right now, we
5 think of them as much different. He says that.
6 They are different cancers. And I think the --

7 THE COURT: So what are we missing here? When
8 I say "we," what are they missing here? Meaning
9 that they are going to have their expert come in
10 and testify as to ovarian cancer as if it is
11 peritoneal cancer?

12 MR. CARUSO: Correct, and whether or not they
13 can do that in part depends on what methodology did
14 they use to come in here and say that. They didn't
15 even engage with this literature. It's not on
16 their reliances. She never looked at it.

17 And for her to just come in here -- and the
18 best evidence they have, they cite in their motion,
19 her testimony is: Did you think they're the same?
20 Yes, I do.

21 Based on what? How is she able to come in
22 here and say that?

23 THE COURT: Did anybody ask her that question?

24 MR. CARUSO: I didn't come in at that
25 deposition, sir, but it's a great question

1 because --

2 THE COURT: But why wasn't that deposition
3 taken? This seems like an important witness and
4 you seem to have a serious concern with --

5 MR. CARUSO: I do, Your Honor.

6 THE COURT: So my question is: Why wouldn't
7 you take that deposition so the Court would have a
8 record and I would know, for example, what was the
9 answer to your last question?

10 MR. CARUSO: Well, part of the record you
11 could look at is what studies did she look at,
12 right? That's on her reliance list.

13 THE COURT: I'm not willing to do that. I
14 want to hear the answer to: What will she say to
15 you in response to that question? Maybe we need to
16 get her on the phone.

17 MR. CARUSO: I think the only thing she can
18 say, Your Honor, is that I didn't look at that
19 literature. It's not on her reliance list.

20 THE COURT: But I'm not sure she needs to look
21 at the literature. I need to know what is the
22 basis for her saying that I can treat these two
23 cancers the same, because that is the answer that I
24 would to hear.

25 Well, were you aware of this literature, no,

1 okay? I don't think that in and of itself
2 disqualifies her from testifying, but the answer to
3 that question may.

4 MR. CARUSO: Right, and I think what they
5 might point to, which they have previously done, is
6 when she listed out what makes these concerns the
7 same, one thing they note is treatment, right?
8 These cancers are treated the same, and oftentimes
9 in the clinical setting, that is why they are
10 conflated so often.

11 But we are not here to talk about treatment
12 and how to best treat these concerns, we are here
13 to talk about the cause of them. And the
14 literature is clear that there are differences
15 between these two cancers.

16 And despite the representation that the
17 literature is equally clear, that they go through
18 and, you know, say that this is study applies to
19 both ovarian, peritoneal, and fallopian cancers,
20 that is just not borne out. In the method sections
21 of these papers, they have been going on -- they
22 have 40 different papers.

23 I would like to see in those papers where they
24 point out each time, yes, we are including primary
25 peritoneal. Yes, we are including primary

1 fallopian. They are not doing that, Your Honor.

2 THE COURT: I know, but the one article that
3 you have, it says that --

4 MR. CARUSO: Which one, I'm sorry?

5 THE COURT: I don't know, this one.

6 MR. CARUSO: Jordan, yes.

7 THE COURT: It says that it is strikingly
8 similar, and it suggests that peritoneal cancers
9 may develop along a different pathway. Tell me the
10 significance. I don't understand the significance
11 of that.

12 MR. CARUSO: So that sentence is speaking to
13 the similar patterns of risk for serous ovarian and
14 fallopian tube cancers, right? And the somewhat
15 different results, which is what I was talking
16 about with respect to talc --

17 THE COURT: But what is the different pathway?
18 What is the significance of the different pathway?

19 MR. CARUSO: It's a different etiology. And
20 it's more clear --

21 THE COURT: So what significance does it have
22 to this conversation?

23 MR. CARUSO: It's significant because what
24 they're taking about here, they are talking about
25 talc, right? They are talking about we looked at

1 perineal usage of talc, we saw a slight increased
2 risk for ovarian, none for peritoneal.

3 It's suggestive of a different pathway, right?
4 A different etiology. And that's what Dr. Ness is
5 trying to come in here and say, I've looked at the
6 literature and it's the same thing, right? Ovarian
7 and primary peritoneal, we can just lump them all
8 together because they are treated the same. But
9 that's not a proper basis.

10 MS. O'DELL: Your Honor, whenever you're
11 ready.

12 THE COURT: I'm ready. Go ahead.

13 MS. O'DELL: I would say a couple things.

14 Number one, even in Jordan, if you look at
15 Jordan on the right side of introduction, it says
16 all three of these may be variants of the same
17 malignancy. If you'll look, paragraph 2 on the
18 right-hand side, it talks about, traditionally, the
19 similarities. "Their close histological and
20 clinical similarities, all three may be variants of
21 the same malignancy."

22 THE COURT: It says they've been classified as
23 separate, but given the close histological and
24 clinical similarities, all three may be variants of
25 the same malignancy.

1 MS. O'DELL: Yes, sir. And I would just point
2 out, this is a 2008 article, and since then, the
3 literature has developed and they consider them as
4 part of the same disease. Let me just point out --

5 THE COURT: But I'm going to ask you the same
6 question I asked counsel. When your expert is
7 asked the question: Are they different or are they
8 the same? And if they are the same, how do you
9 characterize them as the same? Why do you
10 characterize them as the same?

11 MS. O'DELL: Because they are -- and let me
12 just say the ICD-9 codes that my respected counsel
13 cited don't make a bit of difference for this. I
14 mean, we are not talking ICD-9 codes. We are not
15 talking about what the disease is itself, and from
16 a clinician's perspective, what Dr. Ness would say,
17 as an epidemiologist, has looked at this for
18 decades, she would say are they slightly different
19 in terms of where they're located? You know, they
20 are contiguous. But the histological type is the
21 same; the way it is caused is the same from a talc
22 perspective, and because you're dealing with the
23 same cell type.

24 And so one of the other experts said,
25 Dr. Osann, which is one of defendants' experts, she

1 says -- when asked on cross-examination at
2 deposition, she said she'd usually consider it the
3 same. They are usually dealt with together.

4 And so when you look at her treater, he says
5 they are usually dealt with together. They are
6 usually combined.

7 THE COURT: But what does the language mean
8 when it says there is a separate pathway? What
9 does that mean?

10 MS. O'DELL: Well, one, that's part of the, I
11 would say dicta, from a legal perspective. In the
12 article, there's a separate pathway. There is no
13 evidence in the literature that's cited by Dr. Ness
14 or any of the other experts that would suggest that
15 there's a completely different causal mechanism for
16 the way that genital talc causes ovarian cancer,
17 whether it be the fallopian tube, ovary, or --

18 THE COURT: It says, "There is a suggestion
19 that peritoneal cancer may develop along a
20 different pathway." I'm trying to understand what
21 the significance of that is, and did your expert
22 consider that there may be a different pathway for
23 the development of peritoneal cancer.

24 MS. O'DELL: Dr. Ness has considered that, not
25 only for purposes of this case, but for purposes of

1 her scientific literature where she's been a
2 principal investigator on epidemiological studies
3 which gathered the design of those, would gather
4 women who have the cancer that's being studied, and
5 within that group, within those cases, they are not
6 only ovarian cancer, they are fallopian tube and
7 primary peritoneal.

8 So yes, has in her own research she considered
9 the differences, to the degree there are? Yes.

10 THE COURT: But here is what I don't think you
11 are allowed to do, and I think this is what the
12 defense is concerned about: You cannot take all of
13 the literature and all of the adverse things that
14 happen for somebody diagnosed with ovarian cancer
15 and try your case as if you're trying it with
16 somebody having ovarian cancer when your client has
17 peritoneal cancer.

18 And you seem to be saying, well, it's the same
19 thing. And they're saying that, well, who says
20 that? Where is that coming from, that it's the
21 same thing?

22 And that's why I'm asking, okay, what
23 scientific literature is out there that says that
24 it's the same thing?

25 MS. O'DELL: Well, Your Honor, I think we have

1 to be careful with the terms, and I do think this
2 is really a matter for cross-examination for any of
3 these witnesses because you have studies that we
4 are going to put in front of the jury, and they
5 include not just ovarian cancer, they include
6 primary peritoneal cancer, and they are evaluating
7 the effect of talc to cause primary peritoneal
8 cancer.

9 Now, within the researchers, they group those
10 three things together because they feel that that
11 is an appropriate grouping. Dr. Osann --

12 THE COURT: So are you telling me that the
13 testimony is going to be that all of the
14 research -- or the scientific community accepts
15 that all the research associated with ovarian
16 cancer equally applies to peritoneal cancer?

17 MS. O'DELL: It does in relation to this body
18 of literature because primary peritoneal cancers
19 are included in those studies.

20 THE COURT: Okay. I think you need to get
21 your expert on the phone. I think I need to talk
22 to your expert.

23 MR. OLIVER: Your Honor, can I add something
24 for the record? Absolutely, but there is a piece
25 that's been missing from this that I don't think

1 anybody talked about, and it may be because I took
2 this deposition. It was a long time ago.

3 Her treating physician, who is a gynecological
4 oncologist, Dr. Morrissey, actually says -- and
5 I've been reading this. They asked him a question
6 about what kind of cancer and he says, "Gynecologic
7 primary, which would encompass ovary, fallopian
8 tube, and uterus. It's not primary peritoneal
9 carcinoma. It's gynecologic primary."

10 THE COURT: So she doesn't even have
11 peritoneal cancer?

12 MR. OLIVER: She has cancer on her ovaries, in
13 her peritoneal, and her own treating physician
14 says -- her own treating physician --

15 THE COURT: Well, that's a difference. That's
16 an important fact.

17 MR. OLIVER: Her own treating physician says
18 these cancers, it's the same cell. They start in
19 the fallopian tube, based on the literature, they
20 go to the ovaries, they go to the peritoneum. He
21 says, when they ask him: Why did you talk about
22 where it was?

23 He said, well, that's how we do it. We look
24 at where the most massive tumor was.

25 Was it on her ovaries? Yes, it was.

1 THE COURT: You all should have started with
2 that. That's a big difference. That's a big
3 difference than you just saying --

4 MR. CARUSO: Your Honor --

5 THE COURT: You've got --

6 MS. BROWN: I'm Alli Brown, and I just came
7 forward only because I wanted to respond to that
8 point.

9 That testimony actually comes from what was
10 happening during the surgery, so it was before the
11 pathology was finalized. They do sort of like a
12 frozen check to see what it is. And the surgeon
13 was testifying sort of at that time we didn't know.
14 And as Mr. Caruso points out, for purposes of
15 treatment, it doesn't really matter.

16 So just in fairness, I think it's a little bit
17 being taken out of context, and I did want to
18 assure the Court the final pathology report is
19 primary peritoneal cancer, no one disputes that.
20 And while purposes for treatment, the surgeon isn't
21 really interested either way if it's peritoneal or
22 ovarian. From a causative standpoint, it's
23 actually quite an important question that's
24 obviously central to this case.

25 MR. OLIVER: Your Honor, Dr. Morrissey gave

1 that testimony when the final pathology report was
2 presented to his face by their lawyer. And they
3 were trying to get him to say it's all different,
4 and he said it doesn't matter. I said that. I'm
5 the one who wrote it to give it to the pathologist.
6 The pathologist does their thing and I wrote, you
7 know, peritoneal because that's where the biggest
8 massive tumor was. It was on her ovaries, it was
9 on her peritoneum, it could have been all three.

10 The reason they deposed this man was to try to
11 get him to say what they want him to say in this
12 courtroom, and he wouldn't do it.

13 THE COURT: What did you want to say, ma'am?

14 MS. O'DELL: Thank you. I'll pick up where
15 Mr. Oliver left off, and I thank him for pointing
16 that out more clearly than I had before.

17 But my point being, what he was saying, she
18 was diagnosed at very late stage -- I should have
19 started here, I'm sorry, Your Honor -- very late
20 stage of ovarian cancer, which means it had spread
21 throughout the pelvis.

22 You look at her medical records. You heard
23 Mr. Oliver talk about the pathology report saying
24 there was cancer on the ovarian surface. There are
25 other places it refers to primary peritoneal. Her

1 death certificate says fallopian tube cancer. So
2 it's in evidence that it was throughout the pelvis.

3 THE COURT: Okay, I need to understand. I
4 need to understand. When you all stand up in your
5 opening statement, okay, you are going to tell
6 these jurors that your experts are going to come in
7 and your client died of, what?

8 MR. OLIVER: High grade serous cell cancer.

9 THE COURT: Okay. I don't know what that
10 means.

11 MR. OLIVER: That is the type of cancer that
12 Dr. Seskin was diagnosed with. That is the type of
13 cancer that every single --

14 THE COURT: What is it? It's cancer of the,
15 what?

16 MR. OLIVER: It's cancer of the either
17 ovaries, fallopian tubes, or peritoneum. It is the
18 cell type that was on her ovaries, and it was on
19 her peritoneum, and I believe it was on her
20 fallopian tubes as well.

21 THE COURT: I'm trying to understand the
22 significance of this conversation because somehow
23 the defense has the impression that you all are
24 going to be presenting testimony that your client
25 died or contracted peritoneal cancer.

1 You now seem to be telling me -- and you may
2 have said it before and I didn't hear it, but you
3 seem to be taking the position that, no, she died
4 of this type of cancer that encompasses, okay, the
5 ovaries, the fallopian tubes, the peritoneal, all
6 of that, but nobody ever isolated and said that it
7 was peritoneal cancer.

8 MS. O'DELL: There are different references in
9 the records at different times. As Mr. Oliver
10 mentioned, her pathology report talks about cancer
11 on the surface of the ovary. There is a reference
12 in the medical records to primary peritoneal.
13 There are references in the death certificate to
14 fallopian tube cancer. She was a late stage woman
15 with disease throughout her pelvis.

16 THE COURT: I know, but ma'am, my point is
17 that their argument -- I think their argument
18 diminishes significantly if you are telling me that
19 there are -- the medical experts that are going to
20 come in and testify that your client died of
21 ovarian, peritoneal, and other types of cancer.
22 I'm sorry, I look at his argument and I say, oh,
23 well, ovarian cancer was also a cause of her death,
24 so then I would deny the motion.

25 But I was approaching this as if she died from

1 peritoneal cancer as the primary cause of her
2 death.

3 MS. O'DELL: Her cancer, her pelvic carcinoma
4 is the cause, or was the cause, of her death. And
5 that's what Dr. Ness will say.

6 Excuse me, just to be clear, she is a general
7 causation witness. She will say the genital use of
8 talcum powder can cause the type cancer that
9 Dr. Seskin had. And then there will be another
10 witness --

11 THE COURT: And the type of cancer that she
12 had was: Fill in the blank.

13 MS. O'DELL: Well, she had pelvic carcinoma,
14 which includes, and we have reference in the
15 medical records, to cancer on the ovary to primary
16 peritoneal.

17 THE COURT: So she didn't just have one type
18 of cancer?

19 MS. O'DELL: It's just throughout the pelvic
20 area, Your Honor.

21 THE COURT: Do we know where it started?

22 MR. OLIVER: We don't.

23 MR. CARUSO: Your Honor, the pathology report
24 is clear. So as they pointed out in the
25 deposition, Dr. Morrissey is a surgeon. And during

1 the surgery, as Ms. Brown pointed out, he could not
2 make a determination as to where it was. That
3 wasn't his role.

4 So he took it, gave it to the pathologist, and
5 the pathologist, undisputed in this case, makes a
6 finding of primary peritoneal carcinoma. There was
7 involvement of the surface of the ovary, and there
8 was a mature teratoma, which is a benign finding on
9 the ovary. The primary tumor site, the primary
10 cancer site, her diagnosis is a primary peritoneal
11 cancer.

12 And it is important not just for us, it was
13 important for Dr. Seskin. In the medical records,
14 she has correspondence with her treating physician.
15 She went got a consultation at MD Anderson, the
16 leading cancer center in America, and they made it
17 a note in the chart from a prior doctor's visit
18 that she had ovarian carcinoma.

19 She responded to that doctor and said there is
20 a mistake in my medical chart. I do not have
21 ovarian carcinoma. The pathology was specific for
22 primary peritoneal cancer. They are just treated
23 the same.

24 That is the language of the record. It was
25 important to her, it's important in the literature.

1 It is true that they are distinct cancers. It is
2 not the same sort of let's just lump them all
3 together.

4 Some studies have, but not every one, most of
5 them don't even identify what they're calling it,
6 they just say epithelial ovarian cancer. And they
7 are making the assumption that, oh, well, they are
8 clinically similar, so they must be talking about
9 all the same of the pelvic carcinomas. No, that's
10 not true.

11 THE COURT: What they're saying, at least what
12 I heard, is that at the time that her cancer was
13 discovered, it had basically infiltrated all of
14 these different parts, and nobody was able to say
15 that it started here or it started there, and all
16 of the areas were affected. So she had cancer of
17 her ovarian, she had cancer of -- I mean --

18 MR. CARUSO: So, Your Honor, cancer obviously
19 metastasizes, right? And you can start with
20 pancreatic cancer and end up having lung cancer.
21 It's still pancreatic cancer.

22 THE COURT: But normally the doctors can say
23 where it started.

24 MR. CARUSO: Correct, they did that here.

25 THE COURT: It originated here and it spread

1 here.

2 MR. CARUSO: And that's exactly what the
3 purpose of the pathology report was. What is the
4 source of this cancer?

5 And after analyzing it, the pathologist in
6 this case, Dr. Seskin's treating pathologist, said
7 this is suggestive -- not suggestive. He says this
8 favors primary peritoneal cancer. That's what it
9 is.

10 There was minor involvement on the surface of
11 the ovary, and the main mass on the ovary was a
12 mature teratoma. That's a benign finding. It's
13 not related to the cancer.

14 These are distinct etiologies, distinct
15 cancers, and I worry that we are getting a little
16 far afield from the main point here, which is
17 Dr. Ness' methodology as to addressing them.

18 THE COURT: Well, we are not getting far
19 afield because, as I said, I think your argument
20 diminishes if, in fact, she had ovarian cancer as
21 well. And so the point -- your whole point is
22 that, well, they're different.

23 And so my point is but they're testifying that
24 she had all of it, that the entire area was
25 impacted by the cancer. And now you're saying,

1 well, the pathology seemed to suggest something
2 different.

3 MR. CARUSO: Yes, the pathology report doesn't
4 suggest something different; it says something
5 different. It says --

6 THE COURT: I think you need to reach out to
7 your doctor. See if your doctor is able to have a
8 15-minute conversation with the Court.

9 MS. O'DELL: I would be glad to do that, Your
10 Honor.

11 THE COURT: What's next?

12 Do you need a break? Let's take a break.

13 MR. OLIVER: Your Honor, would you like a copy
14 of a surgical report where he confirmed -- well, he
15 confirmed in his deposition, but --

16 THE COURT: This is Dr. Ness? Dr. Ness is the
17 doctor we're talking about, right?

18 MR. OLIVER: Sure, but Dr. Ness is an expert.
19 Dr. Morrissey is -- and I think one of the things
20 that's happened here, Your Honor, is we've gotten
21 general causation expert and we're talking about a
22 specific cause issue. But the thing that wasn't
23 said is every one of our experts -- our experts,
24 not theirs. I understand their experts can say
25 what they want them to say.

1 Our experts are all going to say -- you know,
2 Dr. Chan, specific causation. Does it affect your
3 conclusion at all from a geographic standpoint, the
4 largest mass of the tumor was in the peritoneum, or
5 was diagnosed as primary peritoneal, and he is
6 going to say it doesn't affect it because the
7 literature is the same because the cell type is the
8 same.

9 I can have melanoma on my private parts. She
10 can have melanoma on her private parts. It's a
11 different type of cancer. I've got primary cancer
12 on something different than what she has, but it's
13 the same cancer.

14 MS. O'DELL: And Your Honor, I would just --

15 THE COURT: We are taking a break. We'll come
16 back.

17 (A recess was taken at 11:54 a.m. and the
18 proceedings resumed at 12:05 p.m.):)

19 THE COURT: Let's go back on the record.

20 MS. O'DELL: How do you want to do this in
21 terms of speaking with Dr. Ness?

22 THE COURT: Where is Dr. Ness located?

23 MS. O'DELL: She's in Houston.

24 THE COURT: I can't call from here.

25 MS. O'DELL: Can I put her on my cell phone?

1 Is that appropriate?

2 THE COURT: I don't know how loud that is
3 going to be. Go ahead, you can try.

4 (A speakerphone telephone call was placed.)

5 DR. NESS: Hello?

6 MS. O'DELL: Hi, Dr. Ness. This is Leigh.
7 I'm in the courtroom with Judge Thomas. I've got
8 you on speaker and you are on the bench in front of
9 Judge Thomas. He has a question for you.

10 THE COURT: Can you hear me?

11 DR. NESS: I can. Good morning, Your Honor.

12 THE COURT: All right. Good morning.

13 One of the conversations we've been having is
14 a basis of your opinion, and the conversation about
15 whether or not this was ovarian cancer, or if it
16 was primary peritoneal cancer, and whether or not
17 it makes a difference. So my question to you is:
18 Your understanding and your testimony is going to
19 be what type of cancer was this?

20 DR. NESS: Yes, okay, so let me just be real
21 clear about this: They are the same. There really
22 isn't a distinction between the two, Your Honor.
23 And the reason that I say that is based upon just
24 the literature at this point is exceptionally clear
25 that the genesis, the origin of these tumors, you

1 know, whether they are found on histology lining
2 the ovary, whether they are found in the fallopian
3 tube, whether they are found in the peritoneum, all
4 of those tumors derive from the exact same thing,
5 and that is fallopian tube tissue.

6 They are called FIT tumors. So they spread to
7 all these different places because they are all
8 contiguous; however, they all derive from the exact
9 same tumor type. So they are the same. There is
10 really not a distinction between tumors that are
11 found lining the ovarian tissue or tumors that are
12 found lining in the peritoneal tissue.

13 THE COURT: Well, when you say they are the
14 same, because there is -- this is a Jordan study, I
15 don't know how else to characterize it, and the
16 defense gave me this, and it says the following:
17 It says that the strikingly similar patterns of
18 risk of serous ovarian and fallopian tube cancers
19 and the somewhat different results from primary
20 peritoneal cancer suggests that the peritoneal
21 cancers may develop along a different pathway.

22 What does that mean?

23 DR. NESS: Well, that's the opinion of a
24 single author, and what you'll hear from me in the
25 courtroom is that we never rely on a single

1 opinion. So peritoneal tumors and ovarian tumors,
2 there is a slew of literature that suggests that
3 they have very similar risk factors.

4 You know, you may find one study outlier there
5 where they find different risk factors for the two,
6 but the fact of the matter is, you know, I can show
7 you numerous papers that will say that serous
8 tumors derive from these FIT precursor cells and
9 that they spread to all these different places.
10 And I can find you numerous papers that show that
11 the risk factors are very, very similar.

12 THE COURT: There was an argument that at the
13 end of all of this, her diagnosis was primary
14 peritoneal cancer. You're saying that that has no
15 significance to this conversation?

16 DR. NESS: That is correct. That is exactly
17 100 percent, 1,000 percent what I am saying. That
18 is my opinion.

19 THE COURT: I'm going to let the defense ask
20 any questions that they may have of you.

21 MR. CARUSO: Cross her on these points?

22 THE COURT: Well, you can ask her whatever
23 questions you have.

24 MR. CARUSO: Fair enough.

25 So, Dr. Ness, I just want to ask a few

1 questions about how you went about confirming that
2 these risk factors are sufficiently similar that
3 you do not need to address studies like Jordan
4 2007, Fortner 2020, and Sorenson 2015, which
5 suggest the opposite.

6 DR. NESS: Okay, well, let me be clear about
7 something: You know, you're catching me
8 unprepared. You know, I'm not testifying until the
9 week of the 20th, and I have not reviewed this
10 particular aspect of the literature, so I can't
11 throw back at you references.

12 MS. O'DELL: Dr. Ness, this is Leigh. I'll
13 point out, the Court needs to know that those
14 references that were just listed are not something
15 that Dr. Ness was asked about at her deposition.
16 They are certainly not something --

17 THE COURT: But they didn't take her
18 deposition.

19 MS. O'DELL: They did take her deposition.

20 THE COURT: Oh, you took her deposition?

21 MS. O'DELL: She's been deposed.

22 MR. CARUSO: I did not, but her deposition was
23 taken.

24 THE COURT: Okay, when I asked did you take
25 her deposition, I'm not talking about did you

1 personally take it; I'm talking about did your team
2 take the deposition. That's why I thought -- okay.

3 MS. O'DELL: Dr. Ness' testimony was very
4 clear that she considered them to be part of the
5 same disease, just like she stated, and no further
6 questions were asked.

7 DR. NESS: That's correct. I mean, this is a
8 complete curve ball out of nowhere, so I know now
9 that when I come to trial, I will be prepared to
10 answer these questions with lots of references.

11 THE COURT: All right. Do you have any other
12 questions? She says she's not prepared because the
13 literature that you're making reference to, she
14 doesn't have it in front of her, so she hasn't had
15 a chance to be able to properly respond so it.

16 Did you all provide this literature to her?

17 MS. O'DELL: She was not examined on this
18 literature at her deposition.

19 MR. CARUSO: It was in the briefing on this
20 point, and I think this is part of our point, Your
21 Honor, that she has not engaged with this
22 literature.

23 THE COURT: You've got give her an opportunity
24 to respond to it. What she is saying is that I may
25 have a perfectly good reason to be able to respond

1 to it, but you haven't -- I don't know it, so I
2 can't respond to it.

3 And by the way, if she can't respond to it,
4 it's hard for the Court to make a conclusion as a
5 matter of law that her opinion should be excluded.

6 MR. CARUSO: But her obligation in conducting
7 her general causation analysis was to take the
8 literature and apply it to the specific cancer.
9 That was her obligation.

10 DR. NESS: Wait, wait, wait, I --

11 THE COURT: No, Doctor, you have to wait.
12 Doctor, we'll let you know when we need you to
13 speak, okay?

14 DR. NESS: Sorry. Apologies.

15 MR. CARUSO: She looked at ovarian cancer
16 literature, which, in some cases, in the
17 methodologies of the studies, include -- they state
18 explicitly in this study, we will look at ovarian,
19 fallopian, and peritoneal cancers. In other
20 studies, there is no mention of peritoneal cancer.

21 THE COURT: But what you're doing -- and I
22 will accept that's your argument. The problem is
23 that you can't ask me to exclude a witness based
24 upon studies that you've never presented to the
25 witness to allow the witness to explain to you why

1 those studies are not either reliable or why those
2 studies were not considered. That just is
3 fundamentally unfair.

4 And I don't know enough about the science for
5 me to just say, oh, you found these articles and
6 she didn't consider them. She didn't find them,
7 she didn't know anything about them, oh, I'm going
8 to eliminate her testimony. I won't do that.

9 You've got to give the expert -- especially
10 since you deposed the expert. And when you deposed
11 her, you didn't even ask anything about this. And
12 so now you want me to exclude her based upon the
13 fact that you found articles that you never asked
14 her about. I find that to be fundamentally unfair.

15 MR. CARUSO: Well, Your Honor, we do have in
16 our --

17 THE COURT: Doctor, we don't need you any
18 further. Thank you.

19 DR. NESS: Okay. Thank you very much, sir.

20 MS. O'DELL: Thank you, Doctor.

21 THE COURT: Go ahead, sir.

22 MR. CARUSO: Our experts, such as Dr. Osann,
23 do engage with this literature in her report, such
24 as Fortner, and she goes through why there is a
25 meaningful difference here, and that difference is

1 not addressed in plaintiff's reports. And it's
2 their obligation under Daubert to match up the
3 specific condition that is alleged in the case with
4 the literature, and they have not done that here.
5 And it's not our obligation to show them the
6 literature that conflicts with their position.
7 Their methodology has to be sound.

8 THE COURT: It may not be -- if you take the
9 position it is not your obligation, I personally do
10 not think that this is good practice. I'm just
11 being candid with you.

12 If you are going to challenge their expert on
13 this level, you have to ask the expert about the
14 studies. How can we as lawyers -- we are not the
15 science people. How many times have you all sat up
16 here and said, Judge, I'm not a science person;
17 Judge, I'm going to do the best I can. Why?
18 Because that's not our field. That's not part of
19 our brain that works. They are.

20 We have to give them an opportunity to educate
21 us so that we are making informed decisions, not
22 basically saying -- and you saw it. You got my
23 attention. I said, okay, we spent, how long, about
24 35 minutes on this. All because I was like, well,
25 I don't understand that, what does this mean?

1 And then I find out that you did take her
2 deposition and you never asked her about it. So
3 I'm not excluding her based upon that. It's
4 denied.

5 MR. CARUSO: Understood, Your Honor.

6 THE COURT: Next motion?

7 MR. CARUSO: Can I address other points in
8 Dr. Ness' --

9 THE COURT: Sure.

10 MR. CARUSO: Okay. So I would also like to
11 address her methodology as to her asbestos opinions
12 and her heavy metals opinions.

13 THE COURT: Okay.

14 MR. CARUSO: With respect to her asbestos
15 opinion, she is going to try and come in here and
16 tell the jury that Johnson's baby powder is
17 contaminated with asbestos, all talcum powders are
18 contaminated with asbestos, and that is considered,
19 in my opinion, to be one of the causes of
20 Dr. Seskin primary peritoneal cancer. And her
21 basis for saying talcum powder is contaminated with
22 asbestos is her review of about 50
23 plaintiff-selected documents out of the tens of
24 thousands, hundreds of thousands of documents.

25 And when we said, okay, well, how do you know

1 what they mean? Because these are sophisticated
2 testing documents, obviously very complex, as we've
3 heard in previous motions. And she said, well, I
4 can read the English language.

5 That is not a sufficient basis. If that's all
6 it takes, to read these, then the jury can do that.
7 She does not need to come in here then.

8 THE COURT: Let's just be honest. I'm not
9 sure it's fair to put jurors -- I wouldn't even put
10 myself -- on the same level of somebody who is a
11 doctor who has studied this and they are reading
12 the literature as compared to us.

13 Do you know how many times, your motions, I
14 had to read them? And I don't consider myself dumb
15 or thick, but as I was reading it, I was like,
16 okay, what did he just say? Because you all start
17 throwing around that jargon and it's foreign to me.

18 So my brain is immediately saying, okay,
19 invader, invader, ignore it, ignore it, and then
20 I've got to refocus myself and I've got to read it
21 again. And it's not, well, they said it, Judge,
22 they wrote it in a motion, so it should be that
23 easy. No.

24 Sometimes it requires a level of knowledge, a
25 level of sophistication that I don't think most

1 jurors, all the jurors are required to do, there is
2 no educational requirement for jurors. Hopefully
3 they can read and they can write.

4 MR. CARUSO: Right, so I'll go to this point
5 then, Your Honor. If that is true, correct, that
6 you need some sort of sophistication, and Dr. Osann
7 is a highly educated individual, perhaps more than
8 some of our jurors will be, they have an expert
9 coming in here who is going to testify that, okay,
10 I've looked at all of this information and I
11 determine that there is a chance of asbestos
12 contamination in Johnson's baby powder. They can
13 have that expert -- I'm sure we are going to argue
14 about that, we already did, but it's not Dr. Ness.

15 THE COURT: You're right. I don't allow
16 cumulative testimony. And, in fact, I don't know
17 why Dr. Ness needs to testify that baby powder
18 contains asbestos; I think Dr. Ness needs to
19 testify asbestos was a cause of the injury. I
20 don't think she needs to say it was from baby
21 powder. I think she can say asbestos is a cause of
22 the cancer that the plaintiff succumbed to.

23 MR. CARUSO: And even just to supplement that
24 point, Your Honor, even if she wants to do that,
25 her basis for saying so is the IARC Monograph,

1 which looks at a completely different type of
2 asbestos exposure. It's completely inapposite as
3 to what type of exposure they are alleging here
4 with Dr. Seskin.

5 What they are going to come in here and say is
6 that Johnson's baby powder was contaminated with --
7 we'll take one example -- .00002 percent asbestos.
8 The types of studies that the IARC Monograph is
9 looking at are studies where, during World War II,
10 women were working in factories and getting huge
11 amounts, occupational amounts of asbestos exposure.
12 That's a completely different scenario.

13 It's not applicable to the type of allegations
14 that are made in this case where it's, you know,
15 trace amounts of asbestos exposure that they are
16 alleging. So even on that ground, she can't come
17 in here without doing a comprehensive review of
18 this literature and say this.

19 THE COURT: Do you want to respond?

20 MS. O'DELL: Yes, please. I mean, what
21 Dr. Ness will say is I've seen evidence that there
22 is asbestos in Johnson's baby powder, and she is
23 going to base that on the opinions of Dr. Rigler,
24 going to testify to his testing.

25 THE COURT: Why does she need to testify to

1 that? Why would we care what she thinks is in the
2 baby powder?

3 MS. O'DELL: She needs some basis to include
4 it in her systematic review to say this literature
5 that shows asbestos can cause ovarian cancer is
6 relevant. And I think clearly --

7 THE COURT: I'm sorry, what is her purpose for
8 testifying? Testify to say what?

9 MS. O'DELL: Let me back up. Dr. Ness is an
10 epidemiologist who can testify to the health
11 effects of Johnson's baby powder, whatever its
12 constituents are, which include asbestos, platy
13 talc --

14 THE COURT: Why is she testifying as to
15 Johnson's baby powder? Why isn't she just
16 testifying as to the chemicals -- like, for
17 example, why is she says Johnson & Johnson as
18 compared to testifying if there's magnesium in it
19 and talc, whatever is in it, that should be her
20 opinion. How is she qualified to basically then
21 testify as to Johnson & Johnson's product?

22 MS. O'DELL: Well, I would use the analogy of
23 a pathologist and an oncologist. The pathologist
24 looks at a slide and identifies the type of cancer,
25 what's there, but an oncologist takes that

1 information and he or she evaluates it from a
2 health perspective.

3 Well, that's what Dr. Ness is doing. As an
4 epidemiologist, she will testify to the health
5 effects of asbestos and that asbestos can cause
6 ovarian cancer.

7 THE COURT: I don't have a problem with that.
8 I have a problem with you saying she's going to say
9 that the product had asbestos. She can say this is
10 what asbestos -- this is what a product containing
11 asbestos will do if it is -- if the body comes in
12 contact with it, okay? That's consistent with what
13 I saw in the pathology of this particular
14 plaintiff.

15 MS. O'DELL: Right.

16 THE COURT: But she can't say -- because you
17 have other people saying --

18 MS. O'DELL: She will not go into that in
19 detail.

20 THE COURT: She doesn't go into it at all as
21 it relates to Johnson & Johnson. All she should
22 simply say is asbestos, this is what it does, this
23 is how it affects the body, this is what it causes.

24 MS. O'DELL: She can certainly --

25 THE COURT: She cannot say: So Johnson &

1 Johnson product contained asbestos, so this is what
2 Johnson & Johnson's product did to the plaintiff.

3 MS. O'DELL: She is not going to say that
4 because she is not case-specific. She is a general
5 causation expert. And she is going to testify that
6 asbestos and other constituents that witnesses will
7 talk about are in Johnson's baby powder can cause
8 ovarian cancer.

9 THE COURT: No, she can testify -- without
10 making reference to what other people testify to --
11 asbestos and other constituents cause cancer.

12 MS. O'DELL: Right.

13 THE COURT: Not the way you phrased it. And
14 by the way, it's your job to link it and put it all
15 together.

16 MS. O'DELL: I think we will do that, Your
17 Honor.

18 THE COURT: What's your next issue?

19 MR. CARUSO: My next issue with Dr. Ness --
20 and I can anticipate where you're going to go with
21 it based on what we just discussed -- is she has a
22 similar opinion as to heavy metals, except even
23 less attached to any sort of --

24 THE COURT: That baby powder has heavy metals
25 in it too?

1 MR. CARUSO: No, she is going to testify based
2 on one paper from 1997 from a supplier of our talc
3 that there were increased levels of chromium,
4 cobalt, and nickel. And she has not done a single
5 review on this.

6 THE COURT: I don't understand that. I don't
7 understand how she can testify to that. I'm
8 assuming there is somebody else who can testify to
9 what was in your product. I don't think this
10 doctor is that person.

11 MR. CARUSO: And the related point, Your
12 Honor -- I agree with that. The related point is
13 she can't come in here and say that those
14 constituent metals are linked to cancer because we
15 asked her: Have you done a comprehensive search on
16 the topic of whether heavy metals in the presence
17 of talc powders contribute to their
18 carcinogenicity? I have not.

19 Then we asked her: Have you done it for
20 chromium, cobalt, nickel? No, I haven't.

21 So even though she can't come in and say
22 what's in the baby powder, she can't --

23 THE COURT: What is the basis of her saying
24 that heavy metals contribute to cancer?

25 MS. O'DELL: Well, there is evidence in

1 Johnson & Johnson's own documents that other
2 witnesses can talk about that there is nickel at
3 high levels of 1,800 parts per million, chromium,
4 and cobalt. And then what Dr. Ness can testify to
5 is the health effects of those constituents, and
6 particularly the International Agency for the
7 Research on Cancer has determined that nickel and
8 chromium are group 1 known carcinogens.

9 THE COURT: But is she doing that just because
10 she read an article or is she doing that because
11 she studied it?

12 MS. O'DELL: She's read a comprehensive review
13 and the literature in the comprehensive review that
14 was done by --

15 THE COURT: I don't understand that. Is that
16 what we're coming down to in terms of experts, we
17 give them some literature, some peer reviewed
18 article, and we say, okay, you've read it, now come
19 in and tell us what it says?

20 MS. O'DELL: No, sir, that's not it at all.
21 What we're saying is the product as a whole, just
22 like a cigarette, has numerous constituents, and
23 they, combined together, can cause ovarian cancer.
24 And that's what Dr. Ness is going to say, but
25 within the product itself, the presence of these

1 substances that explain the biologic mechanisms by
2 which it causes cancer.

3 THE COURT: My question though is: How is she
4 qualified to speak about metals causing cancer
5 other than the fact that she's read an article that
6 says it?

7 MS. O'DELL: It's more than that. She's read
8 comprehensive reviews of that literature and she is
9 a cancer researcher for 25 years who has --

10 THE COURT: So she's seen it? Has she seen
11 and been part of studies of which metals have
12 caused cancer? Because I don't think experts are
13 conduits to basically come in here and basically
14 put out what the literature is. Experts don't just
15 come in and say, oh, by the way, this is what the
16 literature says and I agree with it.

17 MS. O'DELL: No, sir, but she as a cancer
18 researcher can take the literature from her
19 perspective as someone who has done these studies
20 on women with ovarian cancer, and other types of
21 cancer for that matter, and she can assimilate that
22 literature and help explain why --

23 THE COURT: But she's never done it as it
24 relates to metals?

25 MS. O'DELL: Well, there is a difference, Your

1 Honor, in saying she's not written a study that has
2 to do with nickel per se in women in saying that
3 the scientific literature, the consensus is that
4 nickel is an inflammatory agent that causes such a
5 reaction that it's not a possible carcinogen or a
6 probable carcinogen, but the World Health
7 Organization has determined it is a known
8 carcinogen to cause cancer.

9 And so it is just a small part, but a part of
10 Dr. Ness' opinion that says the presence of these
11 constituents help explain the mechanism by which
12 talcum powder causes ovarian cancer.

13 THE COURT: So you're doing exactly what I
14 said. It's not based upon any firsthand knowledge,
15 you're just basically repeating what the literature
16 says?

17 MS. O'DELL: Your Honor, if that was the rule,
18 that an expert could never testify to somebody
19 else's article, they could never read the
20 literature, assimilate it, formulate an opinion and
21 testify to it, you had to be an author of the
22 study, then frankly --

23 THE COURT: I didn't say she had to be an
24 author of the study. What she has to have been is
25 she has to have at least experienced -- if she's

1 never come in contact with metals causing cancer,
2 if she's never done any studies of metals causing
3 cancer and the only basis is that she read an
4 article, scientific article, well respected
5 article, and that article says it, my whole point
6 is that she's just a conduit to whoever did that
7 study.

8 You're coming in and wrapping her up in this
9 cloud of, I guess, credibility based upon something
10 that somebody else did. So I'm not saying that she
11 can never -- or no one can ever testify about a
12 study that they weren't part of. We have talked
13 about multiple studies that I would allow people to
14 come in and testify to. But I have to be that it
15 has to be related to something that they have done.
16 I mean, something they have seen.

17 MS. O'DELL: Well, it is related to something
18 she has done.

19 THE COURT: Has she ever seen a cancer that
20 was caused by a carcinoma caused by metal?

21 MS. O'DELL: I can say with 90 percent
22 certainty that she has.

23 THE COURT: Okay.

24 MS. O'DELL: But let me just say this, Judge:
25 When we get to this part of her opinion, I will lay

1 the foundation. So she lays that foundation that,
2 yes, she has seen this in her --

3 THE COURT: The problem that you're going to
4 have -- and I don't know why you would ever want to
5 put yourself in this position, but I'm either going
6 to stop her, or I'm going to give a curative
7 instruction. I'm going to strike it from the
8 record and give a curative instruction telling the
9 jurors to disregard the testimony.

10 Why anybody would ever want to put their
11 expert in that position -- your expert is going to
12 get frustrated because your expert is going to
13 think that they are certainly capable of doing
14 that, they are going to think that the Court is
15 somehow suggesting that they are not as qualified
16 as they think they are, and it just affects the
17 entire presentation. It doesn't make sense that
18 you would proceed that way.

19 Now, I've seen lawyers proceed that way, but I
20 need you all to know that I'm not shy in saying
21 that. If I think that your expert is basically
22 giving an opinion that your expert should not be
23 giving, it's better to do it now rather than wait
24 until your expert is on the witness stand and me do
25 it in front of the jury.

1 MS. O'DELL: Yes, Your Honor. Just to be
2 clear, what Dr. Ness has considered as part of her
3 opinion in this area is not one article. It is
4 compilation of all the literature that deals with
5 nickel, chromium, and cobalt as gathered and
6 synthesized by the International Agency for the
7 Research on Cancer. So it's not just one peer
8 reviewed paper, it is comprehensive --

9 THE COURT: So?

10 MS. O'DELL: -- that says, that concludes, and
11 it's generally accepted, that nickel can cause
12 cancer.

13 THE COURT: I'm not suggesting that the
14 articles are not accurate. What I'm suggesting is
15 that the only reason she knows any of this is
16 because she just simply read an article. She's
17 never treated a patient, she's never done a study,
18 all she's doing -- what's the difference of going
19 and finding an orthopedic doctor who has never done
20 a surgery, never done a surgery on the knee, but
21 you call him as a witness and they come in and say,
22 oh, I read these articles and this is all the
23 problems with the knee.

24 Well, how do you know that? Have you ever
25 done a surgery? No. Well, then why would you be

1 able to come in and testify about --

2 Yeah, anybody can open up a book and see the
3 anatomy and shows what the knee -- how the knee is
4 structured, but that doesn't make you qualified to
5 come into court and give an opinion based upon a
6 surgery of a knee if you've never done surgery on a
7 knee. You have to have --

8 And by the way, I'm not saying she had to have
9 the leading study, I'm not saying she had to have
10 treated 50 people, but she had to have had some
11 exposure to metal causing a carcinoma in order for
12 her to come in and give an opinion that it does.

13 MS. O'DELL: In her work as professor of
14 public health at the University of Texas, Your
15 Honor, I am confident that she has dealt with heavy
16 metals extensively.

17 THE COURT: Then you're good.

18 MS. O'DELL: Okay.

19 MR. CARUSO: Your Honor, we --

20 MS. O'DELL: I just can't point to an article
21 that she's written.

22 THE COURT: I'm telling you I'm not excluding
23 her based upon that at this time because you're
24 telling me that you're able to relate it. If you
25 are not able to relate it, I'm telling you I will

1 ask the jurors to strike her testimony and
2 disregard it.

3 MS. O'DELL: Understood.

4 MR. CARUSO: We asked her, and she said, "I
5 have not reviewed that literature in detail,"
6 period.

7 THE COURT: No, I'm not talking about
8 literature. I'm talking about whether or not she
9 herself has ever treated someone where she has --
10 it has been suggested that it was metals that
11 basically, or some metal product that caused the
12 carcinoma. And if the answer to that question is I
13 have, I think she's allowed to testify.

14 MS. O'DELL: Thank you, Your Honor.

15 MR. CARUSO: But also, Your Honor, it needs to
16 be related to the product that we're talking about
17 and she has no basis to say that these metals are
18 in talcum powder.

19 THE COURT: She doesn't have to say. You
20 asked me to have her not to say it. All she's
21 going to testify to is if these metals are present,
22 these metals can cause cancer. She's not going to
23 testify that it was present in talc or in Johnson &
24 Johnson's product. They have other experts who are
25 going to testify to that.

1 What she is saying is that metals, this is how
2 the metals, when introduced into the body, can
3 cause cancer. And I think if she's had that
4 experience -- and you're representing to me that
5 you believe it's there -- I will overrule the
6 objection and I will allow her to testify to that.
7 And if she doesn't, then she won't testify to it.

8 MS. O'DELL: Thank you, Your Honor.

9 MR. CARUSO: Thank you, Your Honor.

10 THE COURT: Thank you.

11 Next? Plaintiff, I believe you're up.

12 MR. OLIVER: We don't have any more Dauberts,
13 Your Honor. Do you want to move on to MILs?

14 MR. CARUSO: We have Dr. Chan.

15 MR. OLIVER: I don't think we have any more
16 Dauberts.

17 THE COURT: We've got to do everything, so
18 what's next?

19 MR. OLIVER: Okay. We'll do attorney
20 advertising, motion in limine.

21 THE COURT: Attorney advertising?

22 MR. OLIVER: Yes. We filed a motion in limine
23 to keep out mention of attorney advertising. One
24 of the things that the defendants have done in
25 other cases -- and I cited some of this in the

1 motion, and I reread it after three years that I
2 wrote it, and I couldn't believe it. I was like, I
3 can't believe they're saying this stuff in trials.

4 They are going to go in, if allowed, and at
5 some point in the trial, they will make the
6 argument that the reason they took baby powder off
7 the market is because they have been inundated with
8 lawsuits, and what one of the attorneys said was
9 it's 1-800 Sue Me, 1-800 Sue Johnson & Johnson, and
10 they need another defendant. It's stuff that's
11 totally irrelevant.

12 Now, let me tell you why --

13 THE COURT: Wait a minute, they are saying
14 that during the trial?

15 MR. OLIVER: They are saying that during the
16 trial. I don't think it was Ms. Brown, just to be
17 clear. It was one of her colleagues who tried
18 another case, and that colleague actually gave an
19 interview about it to Law 360.

20 And I want to be clear about something, Your
21 Honor. The reason they do that that is their
22 theory of why they took it off the market. They
23 say our product is completely safe, we took it off
24 the market dastardly attorneys doing all this.

25 Now, there is a piece of evidence in our case,

1 and I want to be clear. I don't want you to hear
2 this from them first. They asked my client when he
3 and his wife decided to file a lawsuit and they did
4 see an advertisement. It wasn't my advertisement.
5 He didn't call the person on the advertisement, he
6 called me because we've been friends -- he
7 testified to all this. He called me because we've
8 been friends for 12 years before any of this
9 happened and asked some questions and then retained
10 me.

11 It doesn't -- and in their motion, they talk
12 about this. And I reread their opposition. It's
13 very circular. They were like, well, we have to
14 know why they filed a lawsuit. And I'm like, that
15 is not relevant. The relevant thing is did my
16 client get exposed to the product --

17 THE COURT: I have never allowed a party,
18 plaintiff or defendant, to testify that, oh, I was
19 in the accident and then I called my lawyer before
20 I called the doctor. Or I called my lawyer and --
21 I think it's dangerous, a slippery, slippery slope
22 to get into.

23 If you want to ask questions in jury selection
24 about lawyers advertising, I guess that's really
25 local lawyers more than anything else because I

1 think we have some lawyers who are local, Morgan &
2 Morgan, Rubenstein Law, they are all over the air
3 waves. I just did a trial with Rubenstein Law and
4 I allowed them to ask the question because they are
5 local and they advertise extensively here, and they
6 need to know whether or not jurors think that
7 that's a problem.

8 But I don't know -- and I guess I'm about to
9 hear -- why lawyer advertising is relevant in this
10 case.

11 MR. OLIVER: Your Honor, can I leave you with
12 one fact just to make it clear? My client didn't
13 see this until she was a month from her death, and
14 she suffered with cancer for three years. I just
15 want to make it clear this is not a situation where
16 she saw some advertisement, filed a lawsuit at
17 diagnosed. This happened right before she died.

18 THE COURT: All right. Let me hear from the
19 defense.

20 MS. SCOTT: Your Honor, a big part of the
21 basis of this motion in limine is they want to
22 prevent us from coming in here and disparaging
23 plaintiffs, plaintiffs' attorneys, or their claims
24 or things of that nature, and that is absolutely
25 not what we are going to do, but it is a part of

1 this case. I mean, the testimony of the plaintiff
2 here is that they saw a lawyer ad, and afterwards,
3 they said that's the basis of my belief now that I
4 have this ovarian cancer.

5 So we are allowed to ask questions about the
6 basis of the claim, the validity of the claim, the
7 credibility of the witness for bringing the claim.

8 THE COURT: What is the relevance of that? Is
9 it any different if she saw an ad that wasn't a
10 lawyer ad? She just saw an ad. If you want to ask
11 because you think it's relevant, I was driving one
12 day and I saw a billboard and it made me -- and
13 after I saw that billboard, then I called my
14 lawyer. I mean, I don't know why you need to say
15 that. I don't understand why it is -- what does it
16 go to show?

17 MS. SCOTT: The relevance, Your Honor, is that
18 the basis of this lawsuit is not the science, as
19 they are going to try to say. They are going to
20 try to say the science supports their theory of the
21 case, but the motivation for bringing this lawsuit
22 was not the science. It was seeing this ad and
23 saying, oh, it's an ad, let's investigate and see
24 if we have a claim.

25 THE COURT: I disagree. And by the way, you

1 cannot stand here and tell me that the motivation
2 of somebody who has carcinoma and is dying from
3 carcinoma is because they saw an ad.

4 The motivation is that I'm dying from
5 carcinoma. Somebody may have told me that I have a
6 right, but the motivation isn't because I saw a
7 sign. No. Somebody telling you that you have a
8 right to file a lawsuit doesn't mean that that's
9 the reason you filed the lawsuit. You filed the
10 lawsuit because you were dying of carcinoma and you
11 believed that the defendant is responsible for your
12 injury.

13 So I'm excluding it. I don't think it's even
14 close.

15 What else?

16 MR. CARUSO: Should we do Dr. Chan now, motion
17 to exclude?

18 THE COURT: Let's do that after lunch. I
19 don't want to do another Daubert motion.

20 MR. OLIVER: Do you want us to do more MILs
21 until 1:00?

22 THE COURT: Yes, and then we'll come back and
23 do Dr. Chan.

24 MR. PENDELL: I was going to say, Your Honor,
25 I think Dr. Chan is easy.

1 MR. CARUSO: I would disagree.

2 THE COURT: Of course. Let's do it after
3 lunch. Let's go ahead and do another motion in
4 limine, if the defense has another motion in
5 limine.

6 MS. SCOTT: We've got quite a few.

7 MR. OLIVER: Which one are we doing, Sydney?

8 MS. SCOTT: I think we'll go to our motion in
9 limine 35, which is related to the bankruptcy, and
10 it might be a quick one to go over, Your Honor.
11 Motion in limine 35, we talked a little bit about
12 the bankruptcy issue on Monday. The motion in
13 limine 35 goes to excluding evidence that's a
14 reference to LTL, which is the successor in
15 interest of JJCI's --

16 THE COURT: I'm sorry, aren't they a
17 defendant?

18 MS. SCOTT: LTL? Or LLT? They are a
19 defendant, but the issue in this motion in limine
20 is that evidence related to their restructuring
21 should be excluded as irrelevant because it doesn't
22 have any bearing in this case to the extent we need
23 to talk about it. For example, telling the jury
24 who LTL is, we have a stipulation in the jury
25 instructions that discuss who LTL is.

1 THE COURT: Well, if punitive damages are in
2 the case, certainly that would be relevant and
3 probative.

4 MS. SCOTT: For punitive damages, Your Honor,
5 but the financials of LTL wouldn't be relevant and
6 we can stipulate to those numbers.

7 THE COURT: No, no, what I'm saying -- what I
8 don't allow is I don't allow people to stipulate
9 away bad facts, okay? I think they have a right
10 prove their case, and if they want to prove it
11 without accepting your stipulation, I think they
12 have a right to do that.

13 But I agree with you that, for purposes of the
14 liability, I don't know why we need to get into the
15 restructuring. That, to me, is not relevant and
16 probative to anything. It's just liable; how are
17 you liable, okay?

18 But when it comes to punitive damages -- and
19 now this is if what counsel represented to me on
20 the Zoom is accurate, and I'm not saying it is,
21 that's just what counsel said, I think it's
22 relevant and probative to the issue of punitive
23 damages.

24 MS. SCOTT: It is to the extent of the
25 financials or the amount, Your Honor, the net worth

1 of the defendant.

2 THE COURT: And why you did what you did.
3 They allege that what you did was basically you
4 restructured and you took all the money out of the
5 company and you basically then put some money into
6 this other entity for the sole purpose of just
7 resolving lawsuits, but it was a small fraction of
8 the value of -- I'm not saying it's true, ma'am.

9 MS. SCOTT: I understand.

10 THE COURT: I'm just saying that's what they
11 are saying. And if that is, in fact, what
12 happened, then I just don't see how it's relevant
13 and probative.

14 MS. SCOTT: It's not an allegation in this
15 case, Your Honor, and it's fundamentally not true.
16 We funded our liabilities to the full amount of all
17 litigation, which is why the Third Circuit said you
18 are not insolvent and so you cannot file for
19 bankruptcy. It also specifically said that you did
20 not file this bankruptcy in bad faith and was not
21 going to penalize for trying to find an efficient
22 and effective way to resolve the tens of thousands
23 of talc claims that have been brought against
24 Johnson & Johnson.

25 Furthermore, Your Honor, this sort of evidence

1 has been excluded in all of these cases, almost all
2 these cases because it's not relevant and it's
3 highly prejudicial and it allows the plaintiff to
4 come in here and say the facts that they said on
5 Monday, which are patently false, as pointed out --

6 THE COURT: Well, they have to have evidence.
7 They can't just come in and make it up. They have
8 to have -- first of all, they have to have a
9 witness who is able to say it, okay, and they have
10 to have evidence to support it. They can't just
11 make it up.

12 MS. SCOTT: Well, I mean, I won't say they
13 made it up, but they did misquote or misrepresent
14 what happened with the bankruptcy. And if they are
15 allowed to do that in front of the jury, then J&J
16 has already been poisoned in the mind of jury, and
17 it's going to be very hard if not impossible to
18 undo.

19 THE COURT: Here is what I will do: I will
20 say that they cannot make any statements in that
21 regard during opening statement, and if they plan
22 on introducing any evidence to that effect, then I
23 will, as soon as they are going to call the witness
24 for that, they need to request a sidebar. We'll
25 have an in-camera conversation outside the presence

1 of the jury, and at that time, I will be able to
2 ask the witness questions -- what is the witness
3 going to testify to -- and then I'll then decide
4 I'm letting it in or I'm not.

5 MR. MAZINGO: Your Honor, good afternoon.
6 Ridge Mazingo for the plaintiff.

7 But, Your Honor, you hit the nail on the head
8 overall. Just to elucidate a couple things, you
9 know, number one, we don't intend -- we are not
10 going to make this a mini-trial on the bankruptcy.
11 We are not going to contend the defendants don't
12 have a legal right to file bankruptcy.

13 You know, at the time we wrote this motion, we
14 assumed this was going to be a bifurcated trial, as
15 Your Honor probably did. It was defendants who
16 suggested doing it all in one; that wasn't our
17 decision.

18 We had not planned to bring it up in phase
19 one. This was going to be a phase two issue for
20 punitive damages, as Your Honor talked ability.
21 But it is plainly relevant to punitive damages, as
22 you stated, and one of those reasons is because we
23 are going to call a financial expert, Matt Diaz, to
24 testify about defendants' financials and he can't
25 fully and accurately do that without mentioning the

1 bankruptcy.

2 One of the defendants solely exists because of
3 the bankruptcy, and their financials are rather
4 peculiar because it was a rather peculiar
5 bankruptcy procedure. And you can't fully and
6 accurately testify about the financials of this
7 company without mentioning the bankruptcy.

8 THE COURT: All right. Well, I don't know
9 what he is doing to say, I don't know what the
10 basis of all of that is, but I'm assuming he has
11 the financials and I'm assuming he has a basis, so
12 your motion in limine is --

13 Well, first of all, I'm going to say it's
14 granted in the sense that it will not come in for
15 purposes of liability, okay? And if it does come
16 in, the only possible relevance it would have would
17 be as to punitive damages, and the Court will
18 conduct an in-camera review outside the presence of
19 the jury before that testimony is presented to the
20 jury to make sure that it is based on facts and
21 based upon sound reasoning.

22 Anything else on this motion?

23 MR. MAZINGO: No, Your Honor.

24 THE COURT: Thank you.

25 What other motion in limine?

1 MR. PENDELL: Can I pick one of their motions?
2 Can we do the IARC one? I think that's probably
3 easy.

4 THE COURT: Motions in limine should be easy
5 anyway. Just give me the motion and let's go.

6 MS. SCOTT: That's our motion.

7 MR. PENDELL: I just asked if I could pick one
8 of their motions since it's a very easy one.

9 THE COURT: Well, let them argue it if it's
10 their motion.

11 MS. SCOTT: All right, Your Honor. Motion in
12 limine number four goes to excluding documents from
13 a now bankrupt manufacturer of talc. Defendants
14 seek to move to exclude internal documents that are
15 authored by that nonparty, third-party, and alleged
16 coconspirator called Imerys as hearsay, as
17 irrelevant and hearsay testimony because, one,
18 there was no conspiracy. And so we filed --

19 THE COURT: Is there a conspiracy count here?

20 MS. SCOTT: There is, and we have moved for
21 summary judgment on their conspiracy claim. We
22 rested on our papers for that.

23 But there is no conspiracy. There is no
24 alleged agreement. The only thing that the
25 plaintiffs have alleged is that we were a

1 participant in a trade organization --

2 THE COURT: Ma'am, I'm sorry to cut you off.
3 See, this is why motions in limine are somewhat
4 easier. There is a conspiracy count. Summary
5 judgment has not been granted as it relates to the
6 conspiracy count, and you want me to exclude
7 evidence of the conspiracy from the trial.

8 MS. SCOTT: Not only because they don't have a
9 claim, but also because those are hearsay
10 statements that do not fall under one of the
11 assumptions. In addition, in order get in a
12 coconspirator statement, the plaintiff needs to
13 prove or at least put forward a prima facie showing
14 of conspiracy that's independent of the document
15 that they are seeking to admit.

16 THE COURT: But if I exclude it, then how are
17 they able to establish what you call the predicate
18 in order introduce it? In other words, if they,
19 during the trial, establish the predicate that you
20 say they are required to establish, and then you
21 stand up and you say, objection, Judge, they didn't
22 establish the predicate, and I say overruled, I
23 find that the predicate has been established, then
24 I wouldn't exclude it.

25 But if I say sustained; counsel, do you want

1 to continue to try to lay the predicate? And
2 counsel tries to lay the predicate, then -- do you
3 see what I mean? How do I do this now when I don't
4 know if they can lay the predicate or not?

5 MS. SCOTT: Understood, Your Honor, but --

6 THE COURT: I think what you should do is it
7 should be a contemporaneous objection.

8 Do you have a conspiracy count?

9 MR. FAMILONI: We do, yes.

10 THE COURT: And they have a conspiracy, count.
11 I'm trying to understand how the statements of the,
12 quote, unquote, coconspirators -- or, by the way,
13 any statements in furtherance of the conspiracy
14 cannot be admitted assuming they are able to
15 satisfy the predicate.

16 MS. SCOTT: Well, because Florida law states,
17 Your Honor, that there must be independent evidence
18 to prove a conspiracy and each member's
19 participation in it before admitting a
20 coconspirator hearsay statement.

21 THE COURT: Okay, but how do we get there?
22 If, in fact, I grant your motion, so what are they
23 to do at trial in order to establish -- you are
24 saying establish what the conspiracy is and then --
25 independently establish what the conspiracy is,

1 don't use the statements to establish the
2 conspiracy. Independently establish the
3 conspiracy. Once you've independently established
4 the conspiracy, then -- and you are able to lay the
5 predicate for the coconspirator statements, then
6 you can elicit those statements. But how can they
7 do that if I tell them they can't do it at all?

8 MS. SCOTT: Understood, Your Honor.

9 One further point that I'll make, a lot of
10 these documents post-date Ms. Seskin's succession
11 of use of talc powder. So she stopped using talc
12 powder in 1994. That's the only sworn evidence
13 that we have about her -- the end of her use of
14 talc powder.

15 So we believe that documents that post-date
16 her alleged use should be excluded also as
17 irrelevant.

18 THE COURT: Documents that -- what do the
19 documents say?

20 MS. SCOTT: The documents are internal
21 documents of a nonparty coconspirator.

22 MR. FAMILONI: Your Honor, that's part of our
23 argument is that they were vague. We don't know
24 what documents they are specifically referring to.
25 However, the documents and reasonings that form our

1 elements are actually their own produced documents
2 that we will bring out in trial, to your earlier
3 point.

4 THE COURT: Okay. So I'm just trying to
5 understand: Any documents after 1994, after the
6 period that you say that the plaintiff stopped
7 using your product, you're saying those documents
8 should be excluded because they are not --

9 MS. SCOTT: They are not relevant, Your Honor,
10 because whatever the conspiracy could not be
11 affecting her after she stopped using -- allegedly
12 stopped using Johnson & Johnson baby powder.

13 THE COURT: But what if the documents -- see,
14 because she stopped using it doesn't mean the
15 conspiracy ends. If she stopped using the product,
16 but the conspiracy is ongoing. You remain part of
17 the conspiracy until you affirmatively withdraw
18 from the conspiracy by some affirmative word or
19 act. Meaning you call the police and say to the
20 police, hey, or you tell the police I withdraw from
21 this.

22 And by the way, there have been people who
23 have been convicted because they agreed to do --
24 and when I say "convicted," I know this is not a
25 criminal case, but people have been convicted

1 because they agreed to part -- I agree to rob the
2 bank, okay? And because they agreed to rob the
3 bank and they did some act in furtherance of
4 robbing the bank, then they changed their mind
5 after they robbed the bank, then they said I'm
6 done, I'm not robbing any more banks, but they
7 kept -- the people kept robbing banks. And then he
8 got swept up and charged with the conspiracy for
9 all the banks that were robbed, and he says, but I
10 only agreed to rob the one bank.

11 There was no affirmative action on your part
12 showing that you withdrew from the conspiracy, so
13 all of your acts were taken to be in furtherance of
14 the overall conspiracy, and it doesn't stop because
15 you say I stopped after the first bank.

16 So I think it depends upon the document, what
17 the document says, and I can't grant that motion.

18 MS. SCOTT: Understood.

19 THE COURT: You need to make a contemporaneous
20 objection.

21 MS. SCOTT: Understood, Your Honor.

22 MR. FAMILONI: I would just add, Your Honor,
23 she actually stopped her use of the baby powder in
24 2019. She stopped her diaphragm use of the baby
25 powder in 1994. She continued using the product

1 past the date 2016 date that they stated, but the
2 specific use of her diaphragm she stopped much
3 earlier.

4 THE COURT: Okay. Well, I don't make a
5 finding as to when because I don't know the facts
6 the way you all know them, I'll just simply stand
7 on the motion in limine is denied. I think you
8 need to make a contemporaneous objection at the
9 time.

10 What is the other motion in limine? Next?

11 MR. PENDELL: I had asked if we could do the
12 IARC one. Can we do that? It's going to take four
13 minutes.

14 THE COURT: You can pick one. You don't have
15 to keep letting him pick them.

16 MR. PENDELL: She hasn't let me pick one yet
17 though, Your Honor.

18 THE COURT: You picked the last one.

19 MR. PENDELL: No, no, they did a different
20 one.

21 THE COURT: Oh, that was a different one?

22 MR. PENDELL: Yes.

23 THE COURT: Okay. Well, it's your turn now.

24 MR. PENDELL: Okay. I would like to pick the
25 IARC motion, which is theirs, but it's very simple

1 to settle this controversy, I think.

2 THE COURT: Go ahead.

3 MR. PENDELL: I'm happy to start.

4 MS. SCOTT: Okay. On MIL 13, J&J defendants
5 seek to exclude any misleading characterization
6 that IARC, which is International Agency of
7 Research of Cancer, has classified talc as 2B
8 carcinogen, and the fact that in March 2019, the
9 IARC advisory group identified domestic talc
10 products as a high priority for re-review, look at
11 talc in 2024.

12 We believe plaintiff intends to present
13 evidence that IARC has designated domestic talc,
14 along with 50 other substances, as high priority
15 re-review, but this evidence is irrelevant and
16 highly speculative. There is no guarantee that
17 there will be any review by IARC. It's not slated
18 to occur until June 2024. We are now in February,
19 so four months from now.

20 THE COURT: So let me make sure I understand:
21 Has there been any paper issued or any affirmative
22 statement made that they are going to review it?
23 Or is this just -- I don't understand where it's
24 coming from. Where is this coming from?

25 MS. SCOTT: So there is a statement that says

1 it's on the list to be re-reviewed sometime in
2 2024, but there's no guarantee it will be
3 re-reviewed. If they do re-review it, they said
4 they would do it in June of this year.

5 It's not relevant. It's highly speculative,
6 and it would require us to speculate as to the
7 meaning of why it's on the list with 50 other
8 substances and why it's relevant and why it
9 matters. It doesn't. It would be a complete side
10 show, Your Honor.

11 MR. PENDELL: Your Honor, this is easy: None
12 of this is relevant because our people are going to
13 refer to the IARC stuff as, for talc particles, a
14 Group 2B, which is known as a possible carcinogen
15 to humans. And IARC classifies talc fibers as
16 Group 1, which is a known human carcinogen, and
17 that is how we are going to refer to it in front of
18 the jury. That is how our experts are going to
19 refer to it.

20 THE COURT: Are you going to be making any
21 reference to the fact that they are going to be
22 re-reviewed, along with 50 other substances, in
23 June of 2024?

24 MR. PENDELL: Not in the first instance, but
25 of course, if opposing counsel would like to ask

1 that of one of our experts, they will be prepared
2 to respond. But in the first instance, no, Your
3 Honor.

4 THE COURT: Motion granted unless you open up
5 the door.

6 MS. SCOTT: Okay. Thank you, Your Honor.

7 THE COURT: What's next? We've still got four
8 minutes. I'm trying to give you a taste for the
9 way the trial is going to go.

10 MS. SCOTT: We can do MIL 22.

11 THE COURT: What is it, ma'am?

12 MS. SCOTT: The J&J defendants are moving to
13 exclude evidence related to the foreign labeling of
14 JJCI's products, or to foreign labeling
15 requirements generally. There is just no way that
16 any foreign labeling is relevant to this case that
17 is based on a U.S. citizen using talc that was
18 purchased in the United States.

19 THE COURT: Where was it manufactured?

20 MS. SCOTT: It depends on the time, Your
21 Honor.

22 THE COURT: Well, was it ever manufactured in
23 a foreign jurisdiction?

24 MS. SCOTT: Post 2003 -- well, manufacturing,
25 I'm not sure the exact place, but there was talc

1 that was sourced from mines in China, but prior to
2 that, it was in Vermont, and even earlier than
3 that --

4 THE COURT: Who put the labeling on the
5 packages when it was sent here? Did they follow
6 United States standards?

7 MS. SCOTT: Well, the actual product was
8 manufactured in the United States. What we are
9 trying to exclude is evidence of warning labels
10 that are under different -- under foreign
11 regulatory regimes for Johnson & Johnson baby
12 powder --

13 THE COURT: Meaning that the warning labels
14 were not warning labels used in the United States?

15 MS. SCOTT: Correct.

16 THE COURT: These were warning labels used in
17 another country?

18 MS. SCOTT: Right, they are foreign bottles.

19 THE COURT: Why were you using warning labels
20 used in another country?

21 MR. FAMILONI: Well, Your Honor, for example,
22 we think it's relevant because I'm going to use
23 Canada Workplace Hazardous Materials Information
24 System. They warn of the dangers of talc, and
25 that's often referenced or cited by OSHA, which is

1 our domestic regulation system in terms of what
2 materials are safe or hazardous. And so we believe
3 there is a connection there about defendants'
4 notice, awareness of the dangers of their product.

5 THE COURT: No, I'm not -- because then nobody
6 is obligated to follow -- what the foreign labels
7 say, they don't have the same standards that we
8 have. Their standards are probably a lot -- I
9 shouldn't say this, but their standards probably a
10 lot less than our standards.

11 And so it's unfair to look at what is on a
12 label in a foreign country that doesn't have the
13 requirements that we have and try to apply them to
14 what is going on here. And I think the probative
15 value would be substantially outweighed by the
16 danger of unfair prejudice because they don't have
17 the same standards.

18 MR. FAMILONI: But, Your Honor, to rebut that,
19 respectfully of course, is that this same
20 organization indicated that if you are using talc
21 that contains more than .1 percent of crystalline
22 silica or asbestos, it will meet their criteria for
23 carcinogenicity. That is still, in this country, a
24 standard that is equally dangerous. We forbid that
25 level of crystallizing asbestos in our talc.

1 THE COURT: I'm not talking about any foreign
2 country. Talk about what happened in the good
3 ol' -- make America great. No, I shouldn't say
4 that.

5 We are only going to be talking about what
6 happens here in the United States. We are not
7 going to be talking about everything else going on
8 with every foreign country.

9 MR. FAMILONI: I have one more thing, Your
10 Honor. It's relevant to our punitive damages claim
11 because Johnson & Johnson employees generally got
12 this warning, but the public, as consumers who
13 still bought this product, regardless of
14 jurisdiction or country where this was sold, they
15 had the benefit of the warning, yet the average
16 consumer in the United States did not get benefit
17 of that warning.

18 THE COURT: You know, that's interesting that
19 you say that because I was always wondering: When
20 we talk about punitive damages, do we talk about
21 punitive damages and the continuing manufacture of
22 this product worldwide or are we talking about what
23 they do within a jurisdiction of which an American
24 court has authority?

25 Because, by the way, you can make cigarettes

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1 that, here, we have all these codes and standards
2 and you know what you know, so you stop making them
3 here, but you mass produce them in China and you
4 sell them in China because China doesn't have the
5 same regulations and the same prohibitions.

6 So when we talk about punitive damages, I
7 always thought that we have to talk about it in the
8 context of the United States, not what they're
9 doing worldwide, but I may be wrong. I don't know.

10 MR. FAMILONI: I have no indication that
11 you're wrong, Your Honor. You know, if I was going
12 to make a social argument, of course I think it
13 should apply broadly because, of course, the safety
14 of an individual is not just respective of an
15 American citizen.

16 But in terms of this court and the
17 jurisdiction, I can't say that it should apply --
18 that you should take into consideration a worldwide
19 standard.

20 THE COURT: What about the law? What does the
21 law say we do when we seek punitive damages? If
22 Johnson & Johnson says we totally stopped all
23 distribution of baby powder in the United States,
24 but you have evidence, yeah, but you're still
25 producing it in the world, you're still producing

1 it in all these other countries, is that relevant
2 to punitive damages here in the United States?

3 I don't know the answer. I'm asking. I would
4 think not. I would think that we have to look
5 about what's happening here in the United States
6 because our laws are so different than what happens
7 in another country, so.

8 MR. FAMILONI: Honestly, I can't make the
9 argument otherwise.

10 THE COURT: All right. The motion is granted.
11 Well, the motion in limine was to preclude you
12 making reference to foreign labeling?

13 MS. SCOTT: Labeling of Johnson & Johnson
14 products.

15 THE COURT: Granted.

16 Lunchtime. We'll be in recess. We are only
17 taking recess for 45 minutes. It will be until
18 1:45 p.m.

19 (A recess was taken at 1:04 p.m. and the
20 proceedings resumed at 1:48 p.m.:)

21 THE COURT: You can be seated.

22 What's our next motion?

23 MR. BALZANO: Good afternoon, Your Honor.

24 I'll argue defendants' motion to exclude

25 Dr. Rigler.

1 THE COURT: Okay. Is this another Daubert?

2 MR. BALZANO: Yes.

3 THE COURT: Okay.

4 MR. BALZANO: So Dr. Rigler is plaintiff's
5 asbestos expert, for lack of a better term, but he
6 didn't test any of the alleged bottles that the
7 plaintiff used for asbestos, and he didn't even do
8 an exposure analysis to figure out how much
9 asbestos the plaintiff was exposed to.

10 He does do -- and I want to focus on his
11 exposure analysis because I think that's one of the
12 most important parts. That's his only
13 case-specific opinion.

14 This is the exposure analysis that Dr. Rigler
15 conducted in this case. And again, it doesn't deal
16 with asbestos, it only deals with the amount
17 alleged that the plaintiff was exposed to, and this
18 exposure analysis is complete speculation. He
19 relied on -- and I think my colleague was talking a
20 little bit about this before, about the usage and
21 the history of usage in this case.

22 The only information we have from the decedent
23 in this case a plaintiff fact sheet that she signed
24 four or five days before she passed away.

25 MR. OLIVER: Your Honor, that is false. They

1 keep saying that and we need to correct the record.
2 That is false information that they keep repeating.

3 THE COURT: You'll have your chance.

4 MR. BALZANO: So in that plaintiff fact sheet,
5 she alleged -- they ask what was your exposure,
6 what was your use of Johnson's baby powder, and
7 they put down 1949 to 1994. So from that plaintiff
8 fact sheet, the only information we have is until
9 1994.

10 And Dr. Rigler relied on that plaintiff fact
11 sheet, he relied on the testimony of the plaintiff,
12 Mr. Sugarman, the husband, and he relied on a
13 college friend of the decedent for her usage in
14 1970 to 1974, 50 years ago. And I want to start
15 with the first time.

16 So when you look at the exposure sheet, that's
17 what he starts with. He starts with the 1970 to
18 1974 exposure, which is based on the friend --
19 Diana Ronell is the name of the friend. And when
20 you look at Ms. Ronell's testimony, she says that
21 they would go on trips together sometimes. They
22 would go to the lake, they would go on some camping
23 trips, and she would see her use allegedly
24 Johnson's baby powder.

25 And when asked how many times, she would say a

1 few times. It was vague. Maybe three or four
2 times. She couldn't give a specific number.

3 And Dr. Rigler, from that testimony alone,
4 extrapolates it out to two applications a day,
5 seven days a week, 365 days. The 4 grams number, I
6 mean, we don't really have any testimony about how
7 much she would apply. We're not even sure how she
8 would apply it necessarily.

9 So from that, his exposure assessment is
10 completely speculative. And then when you look at
11 the 1975 to 2018 period, if you isolate 1975 to
12 1993, we don't have any information about that
13 because the decedent met Mr. Sugarman in 1993, I
14 believe. So from 1975 to 1993, there is no
15 information, but still in the exposure, still those
16 two applications a day, seven days a week, 4 grams.

17 Then when we get to Mr. Sugarman, Mr. Sugarman
18 testified in his deposition -- and this is what we
19 were talking a little bit about before. He
20 testified in his deposition that the 1994 time
21 period end date on the plaintiff fact sheet was
22 supposed to only be in relation to the use of her
23 diaphragm.

24 But first off, again, the only information we
25 have from the plaintiff, again, is the plaintiff

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1 fact sheet. And second, why would Dr. Seskin
2 put -- when you look at the plaintiff fact sheet, it
3 asks: When did you use Johnson's baby powder?
4 From 1949 to 1994. She wasn't using her diaphragm
5 when she was born in 1949.

6 So it seems like a weird interpretation of
7 that question to say the '94 end date was
8 diaphragm, but the 1949 start date was any use, or
9 use when you were a baby. So all this is to say,
10 Your Honor, that this exposure analysis -- again,
11 only talc, not asbestos -- he just had assumption
12 upon assumption upon assumption, and it's
13 completely speculative.

14 And I don't think it will help the jury -- one
15 last point. I don't think it will help the jury
16 because it's not like he's doing some type of
17 complex math. He admits in his deposition that
18 this is just simple math. He just takes two times
19 365 times four.

20 THE COURT: All right. Who is this witness
21 again?

22 MR. BALZANO: He is plaintiff's asbestos
23 testing expert. I think he has a degree in
24 microbiology, but he has experience in -- he's a
25 microscopist.

1 THE COURT: All right.

2 MR. OLIVER: So, Your Honor, one thing I want
3 to make clear, at least at this point, I'm going to
4 focus on this exposure analysis. That, quite
5 frankly, is not the main point of Dr. Rigler's
6 testimony. And they don't seem to be challenging
7 that, so if we need to talk about that with you, I
8 do want them to raise that. I just want to make
9 that clear so I can respond just to this part of it
10 because this is by far not the part that's not most
11 important.

12 So the first thing I want to do is make clear
13 a couple things. Dr. Rigler's exposure analysis,
14 he's done this type of analysis before. Your Honor
15 has to remember that the exposure analysis here is
16 exposure to the product, Johnson's baby powder, not
17 a specific level of exposure to asbestos or fibrous
18 talc or the ingredients, just like a cigarette.

19 Your Honor has done cigarette cases. No
20 expert in a cigarette case comes in and says I know
21 which carcinogen caused the cancer, and you had too
22 high a level of plutonium. We know plutonium is in
23 cigarettes, but so are 600 other carcinogens. So
24 it's exposure to the product.

25 He used 4 grams as a conservative estimate.

1 He actually got that from a peer reviewed article
2 that he sent me. There is a J&J document that he
3 also relies on where they surveyed women using
4 talcum powder in the genital area.

5 They used 8 grams as a regular measure, and he
6 can obviously show the jury what a gram sized
7 application of this powder looks like, but that's
8 where he got that. So he went with the lower
9 number, which was something reported in a study,
10 and the higher number is one that is actually
11 reported in J&J's own documentation.

12 THE COURT: So we don't know how much she
13 would use?

14 MR. OLIVER: Well, she didn't testify to that
15 because she died before we scheduled a preservation
16 deposition and she died before we could get that to
17 happen. So what does the testimony show about her
18 usage?

19 THE COURT: The husband didn't know?

20 MR. OLIVER: Well, I'm going there. I'm going
21 there. And I'm going to start in the beginning
22 with her college roommate. Well, I'll start with
23 the sworn statement.

24 So her sworn statement in this case, the fact
25 worksheet, she wrote from birth to 1994. At

1 Mr. Sugarman's deposition, he explained that at the
2 time that Marilyn Seskin filled this out, she was
3 about four weeks from her death. She could not
4 fill it out herself, he filled it out for her by
5 asking the questions and she was able to sign it.

6 So when they ask about this thing about when
7 did she start using it, he said, well, she told me
8 it was used on her as a baby. So she didn't
9 understand that we are not talking about usage as a
10 baby; she just said, well, I used the product when
11 I was a baby because I know my parents put it on
12 me.

13 And that continued until '94. When they asked
14 him about '94, they said something like, did she
15 stop then? And he said, well, she stopped using it
16 on her diaphragm. And they ask a series of
17 questions, and it got kind of entertaining at one
18 point. He finally said, ma'am, we didn't need
19 birth control anymore, that's what she meant. She
20 stopped putting it on her diaphragm in '94.

21 Why? She was 55. We didn't need birth
22 control. Then they asked follow-up questions; did
23 she keep using it on her underwear? Absolutely she
24 kept using it on her underwear.

25 How do you know? I saw it -- we have some of

1 the bottles, by the way.

2 I saw it in her underwear. I did the laundry
3 in the house, I saw it in her underwear. And on
4 several occasions, he testified that he bought the
5 product for her very close to her death, before she
6 had filed this lawsuit and realized that there was
7 a connection between these products.

8 So the usage as defendants have characterized
9 it is not exactly accurate, but these limitations
10 that they're talking about in Dr. Rigler's exposure
11 analysis, he is not going to quibble with those.
12 If they ask him, well, you didn't have any
13 information about what happened between the time
14 her college roommate saw her use it when they were
15 camping and when she met Mr. Sugarman later in
16 life, Dr. Rigler is going to say, that's right,
17 this is an assumption. I'm telling the jury it's
18 an assumption that people use this in a habitual
19 way, just like deodorant.

20 THE COURT: You called it an assumption. How
21 is it not just pure speculation?

22 MR. OLIVER: Well, Your Honor, it's not
23 speculation because it's a reasonable inference for
24 the jury to draw that, look, she was using it. She
25 said she used it her whole life.

1 Her sheet says I used it my whole life in this
2 manner, right? Her sworn sheet. And her roommate
3 saw her use it when she was in her 20s, and then
4 her husband has oodles of testimony about the
5 manners in which he knew she used it and that kind
6 of thing.

7 So there is no speculation, she said she used
8 the product. You get the details of how she used
9 the product and the frequency with which she used
10 the product more from the testimony than you do the
11 fact worksheet because the fact worksheet asked a
12 set of specific questions that she, quite frankly,
13 filled out while she was on her death bed.

14 THE COURT: So I'm just trying to understand
15 your point, sir. Is it your point that this
16 particular witness cannot testify that she used the
17 product or how often she used the product?

18 MR. BALZANO: I think the point is that this
19 really goes to it's not helpful to the trier of
20 fact. As plaintiff's counsel points out, there's
21 plenty of testimony, and the jury can hear that
22 testimony and the jury can decide how much
23 exposure.

24 THE COURT: Did the roommate testify, the
25 college roommate?

1 MR. OLIVER: Yes.

2 THE COURT: Oh.

3 MR. OLIVER: By deposition.

4 MR. BALZANO: So I don't know why we need
5 this. And as plaintiff's counsel said, this isn't
6 the most important part of his testimony. I don't
7 know why we need to get up and say 137,000 --

8 THE COURT: Yeah, why can't you just do that
9 math?

10 MR. OLIVER: There's an answer to that, and
11 it's a really good one. The epidemiological
12 literature that establishes the talcum powder
13 connection between ovarian cancer, it measures
14 exposure in terms of -- and different articles use
15 different terms, but for the most part, it's
16 dosages a day, or usages a day, right?

17 And he is putting it in those terms based on
18 the literature so that if the defendants cross and
19 they want to say, they didn't even tell you how
20 many applications she had, right, we have this
21 information from an expert who said, look, I
22 counted out the applications based on the evidence,
23 I did the math, and I've done this before, I know
24 what I'm looking for in terms of application.

25 THE COURT: I don't understand. But why

1 can't -- the husband is going to testify and the
2 husband is going to testify about how often she
3 would use it and he is going to testify
4 approximately how much of it she would use.

5 MR. OLIVER: That's true.

6 THE COURT: The college roommate is going to
7 testify by deposition and she is going to testify
8 that she used the product. I don't understand the
9 need to have this witness just basically -- really,
10 all this witness is doing is exactly what they've
11 already said and just putting it in maybe a neater
12 package.

13 MR. OLIVER: First of all, I don't agree that
14 he's doing exactly what they've already said
15 because those people are not in any measure going
16 to quantify the number of doses. And if you
17 remember from the defendants' summary judgment
18 motion, Your Honor, one of the things they
19 complaint about -- albeit incorrectly -- is dosage,
20 right?

21 They want to talk about dosage of
22 constituents, but the fact of the matter is what we
23 care about under the law is dosages of product,
24 right? And so they criticize us for not talking
25 about the dosage of the product.

1 Well, we fix that criticism by giving them an
2 absolute number and dosage of the product, which
3 will allow --

4 THE COURT: Where is the dosage number on
5 here?

6 MR. OLIVER: Well, dose is applications. It's
7 total applications.

8 THE COURT: But all it was was math. All he
9 did was just basically take a number and multiply
10 it out. If you take 365 -- right?

11 MR. BALZANO: It's just multiplication, Your
12 Honor.

13 MR. OLIVER: That's right, Your Honor.

14 THE COURT: So you have dosage. Even if they
15 cut someone from saying there's no dosage, it is in
16 the record, you just have to do the math.

17 What is he adding other than taking a
18 calculator and multiplying it out to get dosage?

19 MR. OLIVER: I think, Your Honor, what he's
20 doing is very similar to a federal 1006 exhibit.
21 There is a counterpart in the Florida rules, I just
22 don't remember the number.

23 But essentially, I could give the jury all of
24 the medical bills in this case and just say go add
25 it up, but I don't. I give them a specific sheet

1 of paper on top of the medical bills, which is
2 provided for under the rules of evidence.

3 THE COURT: That is because it is voluminous
4 calculations.

5 MR. OLIVER: That's true.

6 THE COURT: This is not voluminous
7 calculations. I'm looking at this and the only
8 numbers I see are applications per day, two; times
9 per week, seven; number of days, 365; number of
10 years, four; applications, 2,920.

11 That's very, very basic math. This is not --
12 and I agree with you, if this was medical bills
13 where you've got to go to multiple sheets in order
14 to get the number, I get it. That's not what we
15 have here.

16 So I don't think this doctor should basically
17 be able to present -- I think you can do this in
18 argument. I think you can put it together.
19 Meaning you put together -- in other words, in your
20 closing argument, you can pull this sheet up and
21 you can present this as your closing argument as
22 compared to him testifying to it.

23 MR. OLIVER: Sure.

24 THE COURT: Assuming that the evidence is
25 going to come in as you just indicated from the

1 witnesses.

2 MR. OLIVER: Right. I mean, I don't have a
3 problem with that, and I agree that I can do that
4 through argument, but I also agree that it's
5 appropriate to summarize this type of evidence
6 through an expert.

7 THE COURT: Motion in limine, at least as to
8 this part, is granted.

9 MR. BALZANO: Thank you, Your Honor.

10 MR. OLIVER: Now, do defendants want to talk
11 about the other stuff with Dr. Rigler? Because if
12 they do, I need to know.

13 MR. BALZANO: So I want to talk about next his
14 opinion about asbestos being above ambient levels.

15 MR. OLIVER: Okay.

16 MR. BALZANO: So the next opinion Dr. Rigler
17 gives is -- so, again, Dr. Rigler, like plaintiff's
18 counsel said, they do have -- they allege some
19 bottles that Mr. Sugarman found in his house that
20 Marilyn Seskin allegedly used. He didn't test that
21 bottle though to see if that contained asbestos.

22 They didn't test that bottle, and like we were
23 talking about earlier with Dr. Sitelman, Dr. Rigler
24 can do a tissue digestion to see if Dr. Seskin's
25 tissue contained --

1 THE COURT: You mean the actual bottle of talc
2 powder that she used, he didn't test it?

3 MR. BALZANO: He didn't test it.

4 MR. OLIVER: Neither did the defendants.

5 THE COURT: But my question is: But why does
6 he need to test it if the ingredients -- do you put
7 different ingredients in the product?

8 MR. BALZANO: No. And Your Honor, I think the
9 more important point is that he didn't test
10 Dr. Seskin's tissue either, so there is no
11 connection. He could have digested her tissue to
12 see if there was asbestos, what we were talking
13 about earlier with Dr. Sitelman, to see if there
14 was asbestos in Dr. Seskin's tissue. He didn't do
15 that either.

16 So he has no connection to this case. And
17 what the opinion that he wants to come in here and
18 say is that Dr. Seskin had exposure to asbestos
19 above ambient levels, meaning above levels that are
20 just in the air.

21 THE COURT: But how does he know that?

22 MR. BALZANO: Exactly. And one more point --

23 THE COURT: How does he say he knows that, is
24 my question.

25 MR. BALZANO: Well, in another case that

1 plaintiff's counsel has, the Matthey case, this was
2 a deposition in 2020, we asked them. So this is
3 September 11, 2020, and we asked them: "We just
4 want to make sure when you come into trial and you
5 get on the stand, you are not going to tell the
6 jury that Ms. Matthey had an exposure to asbestos
7 in the excess of ambient? You are not going to
8 tell them that, are you?

9 "ANSWER: I would have to think about that.

10 "QUESTION: Okay.

11 "ANSWER: I can't make an answer to that right
12 now as I sit here.

13 "QUESTION: All right. Sitting here today,
14 you have not formed the opinion that Ms. Matthey
15 was exposed to asbestos in the excess of ambient,
16 fair?

17 "ANSWER: That is fair."

18 And then at our deposition in the Sugarman
19 case, he says, "All right. And my question,
20 Dr. Rigler, is today you've offered an opinion that
21 Dr. Seskin was exposed to asbestos in excess of
22 ambient, but you weren't able to do that in 2020 in
23 Ms. Matthey's case. Can you explain why you are
24 now able to make that opinion?"

25 And he starts to read the deposition, and then

1 he says -- so this was September 11th of 2020 --
2 "I've had time to think about it. I've had time to
3 think about that since that time, and again, based
4 on what I talked about earlier and the questions I
5 answered earlier, it would be my opinion, you know,
6 more likely than not, she would have been exposed
7 to a level above ambient."

8 THE COURT: Does he say why he says that?

9 MR. BALZANO: He had more time to think about
10 it. In 2020 --

11 THE COURT: No, that's why he's now able to
12 answer it, but why can he say now to a reasonable
13 degree of certainty that -- more likely than not, I
14 think is what he said -- that she was exposed to
15 levels above ambient?

16 MR. BALZANO: Well, first off, I think he is
17 probably going to be relying on -- and this is what
18 another portion of our motion is, is he relies on
19 litigation testing from -- he used to work at a
20 laboratory, MAS Material. I'm not really sure what
21 it stands for.

22 But he used to work there and that laboratory
23 was retained. There is another expert, Dr. Longo,
24 in this litigation, and they tested baby powder and
25 they say that they found asbestos, but it's all

1 litigation reports. It's all litigation tests.
2 It's all funded by plaintiff's attorneys and --

3 THE COURT: Well, does that mean that it
4 didn't be relied upon?

5 MR. BALZANO: No, no, no, and I think the
6 important point is, in 2020, he had those tests.
7 Those tests happened in 2017 and 2018.

8 THE COURT: What I'm trying to get to, and
9 maybe we'll just ask the plaintiffs, I'm trying to
10 get to: There has to be -- he can't just say it.
11 He has to have a basis for saying it.

12 So what is the basis for saying it?

13 MR. BALZANO: I don't know what his basis is.

14 MR. OLIVER: So the basis for him saying it is
15 the body of his work that he performed, not
16 specifically this case, but for these cases.
17 Dr. Longo is not our expert, but Dr. Rigler at the
18 time was like his partner in the lab. Dr. Rigler
19 went out and started his own lab called Aspects
20 Labs. They actually use the same space, they just
21 had a different financial arrangement now or
22 something.

23 So what they did in the context of this
24 litigation, I believe through the MDL proceeding up
25 in Philadelphia, was they gathered up samples of

1 Johnson's baby powder. Some Imerys railcar
2 samples, which were also Johnson's baby powder,
3 Imerys is just the supplier of the raw talc.

4 So they gathered up these samples. Some of
5 them came from places that they got them off the
6 internet. They bought them. Others came from
7 things that the defendants produced. And they did
8 a three-step process to test for asbestos.

9 What Dr. Rigler will testify to is, yes, I
10 tested these bottles of baby powder, I tested them
11 from this decade, this decade, this decade, I used
12 these methodologies, and he has exact numbers, but
13 between 70 and 72 percent of the time with regard
14 to Johnson's baby powder, I found asbestos
15 structures -- and he has pictures of them and all
16 that stuff -- in the bottle.

17 So that testimony goes to defect and they have
18 arguments about that. I just want to make sure we
19 are not confusing that.

20 But that also forms the basis of his opinion
21 regarding above ambient exposure. Above ambient
22 exposure -- ambient exposure is what you and I get
23 walking down the streets of New York or Miami,
24 right? There might be asbestos in the air.

25 What Dr. Rigler is going to say is, look, I've

1 tested baby powder. 72 percent of the time, it has
2 asbestos in it. When it has asbestos in it, I can
3 tell you, using mathematical calculations, roughly
4 how many fibers are in a gram of that powder. This
5 is sort of accepted industry science on how you do
6 that math.

7 He is not going to say -- he will certainly
8 say I'm assuming her testimony is true, right, that
9 she used the product. I mean, I believe it. And
10 he is going to say if I believe the testimony of
11 record, and this woman used this her whole life on
12 her genitalia from age of sexual maturity to her
13 death, then this would be above ambient exposure.

14 Because you or I don't have that. That's the
15 definition of ambient is just background. But what
16 she has has to be far greater than background
17 because she was using it in a time period during
18 decades which we know it had asbestos exposure in
19 it.

20 THE COURT: If her testimony, or if the
21 testimony about how often she used it, if that
22 testimony is accepted, wouldn't that just
23 automatically be above ambient?

24 MR. OLIVER: That I believe is true, yes. I
25 mean, he is going to say that based on his

1 testing --

2 THE COURT: So I guess the reason I'm asking
3 is why then -- I understand if he explained ambient
4 the way you just explained what ambient is, why is
5 it necessary for him to then come in and opine that
6 her exposure was above ambient? Because it doesn't
7 seem like that's a complicated fact that an expert
8 would need to opine on because ambient is just
9 basically saying this is just normal exposure based
10 upon everyday living, walking around, existing.

11 MR. OLIVER: He will need to explain that.

12 THE COURT: Right, he would explain that.

13 MR. OLIVER: Sure, sure.

14 THE COURT: I don't know if this is really --
15 if we should be fighting over this, because if he
16 explains what ambient is, and then he says, well,
17 her exposure was above ambient because, okay, she
18 used the baby powder -- accepting the testimony as
19 true, she used the baby powder for this period of
20 time, that by definition would be ambient exposure.

21 MR. OLIVER: And maybe to put some of it in
22 context on why he needs to say this, the defendants
23 are going to put on a case that -- first of all,
24 they're going to tell everybody that talc is
25 everywhere. It's everywhere, it's everywhere.

1 Talc is everywhere. It's on your medicine, it's on
2 your this, it's on your that.

3 And they are going to say the same thing about
4 asbestos. There is asbestos out there just
5 flouting around in the air, right?

6 So it matters -- which is not true, right? It
7 matters to have an expert say, look, you know,
8 people who are just walking around and not using
9 this product, they are not getting exposed to the
10 same level of asbestos as somebody who is walking
11 down the street, right? You would have to be in a
12 construction job or, you know, doing something like
13 that where you are exposed to an extra level of
14 asbestos. That's why we need the testimony.

15 THE COURT: I get it.

16 MR. BALZANO: I think the problem here -- and
17 to go back to the exposure assessment, I started
18 with this, he could have calculated based on his
19 assumption how much -- because that's more
20 complicated math -- to see how much asbestos
21 Dr. Seskin was exposed to based on her alleged use.
22 But he didn't do that.

23 There is no connection, I think that's the
24 point here, is that Dr. Rigler, he is just going to
25 get in here and say, yeah, the talcum powder that

1 she used exposed her to asbestos above ambient
2 levels, but there's nothing to back that up. There
3 is no connection to this case.

4 He didn't look at the tissue. He didn't look
5 at her bottle. He didn't even conduct some type of
6 exposure analysis for asbestos.

7 THE COURT: I don't understand that argument
8 because what he is saying is he's accepting that
9 her use is factually supported by the record.
10 Meaning if, in fact, her use is incorrect, meaning
11 the jury rejects the testimony regarding her use,
12 then his opinions all go away, right? Because his
13 opinion is based upon the testimony that has been
14 presented in the record.

15 And so I don't know anything requiring him to
16 basically say that it's this many parts per
17 milliliter of exposure. All he needs to say is that
18 it's above ambient. I don't think he needs to
19 quantify it, like to say how much above ambient. I
20 don't know why that is required.

21 MR. BALZANO: I think it would be important
22 for him to look at studies and look at the ambient
23 level of asbestos to try to add some type of value,
24 some type of expert value.

25 THE COURT: Why?

1 MR. BALZANO: I mean, to add expert value to
2 the case. I mean, in 2020 --

3 THE COURT: I would think that if he didn't,
4 you would be happy about that, because if he did,
5 that would just make their case stronger and your
6 case weaker. If he didn't, that makes your
7 cross-examination more colorful and it makes your
8 argument to the jury more powerful.

9 MR. BALZANO: Understood, Your Honor, but I
10 would just leave you with the fact that he just
11 sort of changed his mind from 2020 to 2023. He had
12 more time to think about it. I don't think that is
13 emblematic of a well thought out --

14 THE COURT: You all just stood up there about
15 three and a half hours ago and you told me that
16 science is forever evolving. Science doesn't
17 just --

18 MR. BALZANO: Not this science though, to be
19 fair. It's different science.

20 THE COURT: Motion in limine is granted as to
21 the -- I'm sorry, I granted it as to the exposure
22 and I'm denying it as to the ambient levels.

23 MR. BALZANO: And there is one more portion in
24 the motion, but I would like to rest on the papers
25 for it. It's really complicated.

1 THE COURT: It's really convoluted?

2 MR. BALZANO: Complicated asbestos science.

3 MR. OLIVER: Both.

4 THE COURT: Okay. Tell me what it is.

5 MR. BALZANO: So the bulk of Dr. Rigler, what
6 we expect the bulk of Dr. Rigler's opinion will be
7 when he used to work at this other MAS lab and
8 their testing of Johnson's baby powder. They
9 tested a number of bottles, and there is a couple
10 portions of this.

11 I mean, we say that it's unreliable. We argue
12 that it's unreliable testing because when you look
13 at the asbestos -- so when plaintiff stands up here
14 and talk about tremolite or anthophyllite, there is
15 an asbestiform version of tremolite, which is
16 asbestos, and then there is a non-asbestiform
17 version of tremolite. Not all tremolite is
18 asbestos.

19 THE COURT: Okay.

20 MR. BALZANO: And it depends on how it grows
21 in the earth. The asbestiform is needlelike, and I
22 think the tensile strength, it doesn't break
23 easily. The vast majority of tremolite and
24 anthophyllite is not non-asbestiform. It doesn't
25 grow in that habit.

1 But what happens is when you're dealing with
2 these really, really tiny, really small particles,
3 is if you take a non-asbestiform tremolite and you
4 break it, some of it can sometimes look like a
5 needle, but it didn't grow in an asbestiform habit.
6 So to identify tremolite, to look at talc and see
7 tremolite, that's not necessarily asbestos. And
8 it's unreliable because, you know, you cannot
9 distinguish between asbestiform and non-asbestiform
10 using the methods that Dr. Longo --

11 THE COURT: Who says that?

12 MR. BALZANO: Who says that you cannot
13 distinguish? So there are a bunch of definitions
14 from various public health authorities and public
15 agencies.

16 THE COURT: I know, but you have to tell me --
17 you're saying his opinion is unreliable. I need to
18 know it's unreliable because it's not the proper
19 methodology. It's unreliable because it's not
20 proper application to the facts in this case. It's
21 unreliable --

22 That's what I need, and you can't just talk to
23 me about -- you've got to give me something
24 specific that I can hang my hat on.

25 MR. BALZANO: So when you look at a bunch of

1 government agencies, they all define asbestos as
2 tremolite asbestos, or something grown in an
3 asbestiform habit. And the methodology that he
4 relies on is something called AHERA.

5 It is escaping me what it stands for right
6 now, but it is some type of government protocol, I
7 think issued by OSHA. And that was primarily for
8 when they were abating schools. Like schools would
9 have asbestos or buildings would have asbestos and
10 they were abating it.

11 Now, those counting methodologies, when they
12 would look at the air to see if there were
13 particles in the air, and if they saw tremolite,
14 they would characterize it as asbestos tremolite,
15 but that's because they knew beforehand that there
16 was asbestos in the walls. So they don't have to
17 worry about misidentifying non-asbestiform
18 tremolite with asbestiform tremolite.

19 And these are the counting procedures that
20 Dr. Rigler and Dr. Longo used when they were
21 looking at talc. They would see tremolite and they
22 would count it as a fiber. Under these procedures,
23 you would need to count, I think it was either
24 three or five fibers to say that something --
25 because sometimes it could be contamination if you

1 just found one, so they had counting protocols.

2 So there are a lot of -- so non-asbestiform is
3 what we call cleavage, a cleavage fragment, and we
4 say that there are a lot of authorities that say
5 there is no scientific proof to show that the
6 non-asbestiform version of tremolite or
7 anthophyllite are harmful.

8 THE COURT: So the gist of what you're saying
9 to me is that you don't believe that he has
10 properly tested or the proper amount of asbestos,
11 at least the tremolite asbestos, and therefore, his
12 opinion is unreliable?

13 MR. BALZANO: Right.

14 MR. OLIVER: Your Honor, so first of all, let
15 me just back up and say that Dr. Rigler applied the
16 counting rules that have been endorsed by the EPA,
17 which have a five-to-one aspect ratio, and OSHA has
18 even done -- well, actually, he applied OSHA, which
19 is a three-to-one. I think EPA has done a
20 five-to-one.

21 These are the accepted counting rules within
22 the industry. They are the majority counting
23 rules --

24 THE COURT: He is going to testify to that?

25 MR. OLIVER: Oh, he is absolutely going to

1 testify to it. And they are going to put up an
2 expert who is going to talk about some different
3 counting rules, and the interesting thing is nobody
4 follows those counting rules except Johnson &
5 Johnson and other industry participants who want to
6 get away from asbestos lawsuits.

7 THE COURT: OSHA doesn't follow it?

8 MR. OLIVER: No, they follow the three-to-one.
9 They follow what Dr. Rigler did, right? So he's
10 following the accepted regulatory and scientific
11 counting rules.

12 In terms of whether tremolite that is a
13 cleavage fragment is dangerous, the authorities
14 also agree -- and this is in the peer reviewed
15 literature -- that we don't know whether it's the
16 chemical composition of the asbestos or the
17 needlelike shape, but there are many scientific
18 authorities -- in fact, the majority position --
19 that say, look, it's the needlelike shape that
20 matters.

21 So when you take a rock of tremolite and throw
22 it on the ground, the rock isn't going to hurt you.
23 But if you shatter it with a ball and it turns into
24 little shards, there are tons of scientists out
25 there that are going to say that's the problem,

1 it's the needlelike shape.

2 And, in fact, the FDA convened an
3 international working group on this issue. Now,
4 the FDA hasn't finalized this yet, but the working
5 group recommended to FDA to follow the process for,
6 you know, finding the asbestos that Dr. Rigler
7 recommended, they are using the same rules, and in
8 that working group statement, they say everybody
9 agrees it's the needlelike shape that is the
10 problem, not necessarily the chemical composition.
11 That's why we have six different types of asbestos
12 and they all have a different chemical composition,
13 but we know they all form cancer because they all
14 tend to come in this needlelike shape, as does
15 talc.

16 So there's absolutely no problem with the
17 methodology used, but here is the best part, Your
18 Honor. They are complaining about cleavage
19 fragments. Dr. Rigler testified when I counted, I
20 didn't count cleavage fragments, and 96 percent of
21 what we counted in our test are what are called
22 bundles.

23 Bundles are multiple strands of asbestos or
24 fibrous material, you know, laying on one another.
25 96 percent were bundles. Bundles can't be cleavage

1 fragments. They are mutually exclusive.

2 Cleavage fragment is what it sounds like. He
3 said he didn't count those, and anyway, 96 percent
4 were bundles.

5 So this argument is simply something that a
6 bunch of old asbestos scientists might sit around a
7 bar and debate and say, well, that's interesting,
8 I'll look at this paper, I'll look at that paper,
9 but it is not anything that has to do with Daubert.

10 THE COURT: Anything else?

11 MR. BALZANO: I would like to sit with the
12 asbestos scientists. I'm sure it would be fun.

13 But just on the bundles point, so, again,
14 Dr. Rigler worked at MAS, and MAS has done all of
15 this talcum powder testing in the auspices of
16 litigation. They all were being paid by
17 plaintiffs' attorneys to do these tests.

18 And this bundle point, there was -- it is so
19 subjective, so if I could hand up -- I'm sorry, I
20 don't have a copy for you, counsel.

21 MR. OLIVER: That's okay.

22 MR. BALZANO: This is just from page 11 of our
23 motion. This just shows how subjective this type
24 of microscope and this type of testing is.

25 When you -- they would have various TEM, they

1 would use that type of microscope to look at these
2 fibers and bundles. And at a certain point, they
3 weren't finding as many bundles. I don't have the
4 numbers in front of me, but they were finding
5 something like 40 percent of the tremolite or
6 anthophyllite particles that they were identifying,
7 they were saying were bundles.

8 And then at some point, that shot up to like
9 93 percent. And what they would do is they were
10 looking and they were just -- it is so subjective
11 to just look at that picture and say, well, that
12 looks like a bundle. Or, well, that looks like a
13 fiber.

14 And there is just no methodology behind --
15 it's just the eyes of the microscopist when they
16 are looking at that particular particle.

17 THE COURT: Isn't it just about counting and
18 what you see?

19 MR. OLIVER: It's a five-to-one aspect ratio,
20 or three-to-one. Those are measurements that every
21 singer fiber satisfied. Those are the counting
22 rules.

23 So it's not arbitrary. They didn't make this
24 up. That's what they followed.

25 MR. BALZANO: So counsel is talking about --

1 THE COURT: This one here is a single fiber?

2 MR. BALZANO: That's what the MAS scientists
3 say, and then the other one, they're saying is a
4 bundle.

5 So I don't want to get confused with the
6 counting rules. There is a difference between
7 counting what you see as a fiber, and then when
8 we're talking about bundles, a bundle is something
9 where, when you look at the fiber, it sort of is
10 breaking up, and what that shows you is that it
11 grew that way. And that's why it matters, because
12 it's whether or not it's asbestiform.

13 THE COURT: Why would this be a bundle?

14 MR. BALZANO: I agree. I don't think it's a
15 bundle.

16 MR. OLIVER: Your Honor, that argument cannot
17 stand. I cannot look at that and tell you anything
18 about this, and neither can he. That is insanity,
19 all right?

20 Our doctors have the absolute -- the rules,
21 right? The rules for counting. And J&J is going
22 to say we have our own rules that we wish somebody
23 would adopt. We wish the FDA would do what we want
24 them to do because then we would never get in
25 trouble. But the FDA hasn't agreed to do that.

1 THE COURT: I get it. The motion is denied.
2 What else?

3 MR. BALZANO: Thank you, Your Honor.

4 THE COURT: Thank you.

5 MS. SCOTT: We have one last motion to exclude
6 on -- I'm sorry, two more motions to exclude. This
7 one on Dr. Plunkett.

8 THE COURT: Okay.

9 MS. SCOTT: Your Honor, the J&J defendants
10 have moved to exclude the testimony of Dr. Laura
11 Plunkett. We are going to focus our argument today
12 on three buckets of her opinions, and I'm just
13 going to start off by saying that Dr. Plunkett is a
14 toxicologist and a pharmacologist, but that's by
15 training.

16 Her profession is she's been a paid consultant
17 and expert witness traveling the circuit offering
18 expert opinions. And I'm not saying that to malign
19 her character in any way, everyone has to make a
20 living, I'm just saying that based on our
21 experience with her, particularly in this talc
22 litigation, we have a sense of what sort of
23 opinions she's going to offer, and particularly,
24 the inadmissible opinions that she is going to
25 offer.

1 As I started off, those opinions fall under
2 three buckets. The first bucket is on opinions on
3 FDA regulations. The second opinion is on what I
4 referred to earlier with Dr. Freidenfelds corporate
5 mind reading, and then again this reading
6 unambiguous corporate documents into the record and
7 putting her own expert spin on those documents.

8 Courts around the country have excluded
9 Dr. Plunkett's testimony on these sorts of opinions
10 and we would submit that this Court should join
11 those courts as well. I'll go one by one and talk
12 about those buckets.

13 So the first one is on FDA regulations.
14 Dr. Plunkett intends to come in and talk about --

15 THE COURT: What's her background?

16 MS. SCOTT: She's a pharmacologist and
17 toxicologist.

18 THE COURT: Okay. I think you said that. Go
19 ahead.

20 MS. SCOTT: Yes, Your Honor, and she's been a
21 consultant for 25 to 30 or so years. She intends
22 to tell the jury things like J&J defendants failed
23 to comply with FDA regulations governing things
24 like warning labels and cosmetic. She doesn't have
25 a lot of experience in cosmetic. As a

1 toxicologist, she focuses on drugs and drug
2 labeling.

3 But in any event, plaintiff admits in their
4 response that Dr. Plunkett is going to come in and
5 talk about the applicability of the FDA regulation
6 to cosmetics -- that is, which regulations apply --
7 and she is also going to say whether or not the
8 defendants met those requirements -- that is,
9 whether the defendants complied. And that's pure
10 legal opinion, Your Honor.

11 Moreover, Dr. Plunkett has never worked for
12 the FDA. She has almost no experience with
13 cosmetics. She is not qualified to offer these
14 sorts of opinions.

15 She is clearly opining on the law, and in a
16 similar case involving talc litigation, a trial
17 court in California -- and we have the language
18 here on the slide -- precluded Dr. Plunkett from
19 opining that talc-based powders should have been
20 labeled to warn of the risk for two reasons.
21 First, she can't give a legal opinion, and second,
22 she's not qualified on FDA regulations or the
23 applicability of their labeling.

24 So I think plaintiffs responded in their
25 response that she is a scientist and she is going

1 to give her views on the law as a scientist, but
2 that makes her even less qualified to opine --

3 THE COURT: I'm sure they didn't say that.
4 Did they really say that, she is going to give her
5 views on the law?

6 MS. SCOTT: The response at 35, Your Honor,
7 her opinions in this case do not come from
8 interpreting statutes and regulations as a lawyer,
9 but as a scientist.

10 Another case that we have cited on this slide,
11 Your Honor --

12 THE COURT: But when do I let anyone come in
13 and interpret the law? I don't understand that.
14 She is going to come in and interpret the law as a
15 scientist?

16 MS. SCOTT: I agree with that, Your Honor.
17 You are not supposed to come in here and tell the
18 jury what the law is, opine on what the law is.
19 That is your job, obviously, of course is to
20 instruct the jury on the law and they will follow
21 the law that is given by you, not by an expert.

22 THE COURT: Is there any dispute as to what
23 the FDA regulations require?

24 MS. SCOTT: There are instances where, for
25 example, she talks about whether or not we

1 misbranded our products, whether they need to be
2 labeled, and I think the legal dispute there is
3 whether we needed to label or not under the FDA's
4 regulations, and she is going to come in and say
5 yes, defendants were supposed to label these to
6 label baby powder under the FDA regulations.

7 THE COURT: So what she's saying is that she
8 is going to point to a specific provision of the
9 FDA regulations and say, under this particular
10 regulation, it requires products to be labeled and
11 this is what the labels should require?

12 That, to me, is not interpreting the law.
13 That's just simply saying what the rules and
14 regulations are as it relates to that.

15 The only other way that could happen is if you
16 all are under agreement as to this is what it
17 requires, and I then instruct the jurors. Because
18 if not, who is going to come in and tell the jurors
19 that this is what the label -- you are required to
20 have a label, you are not required to have a label.
21 This is what the regulations say, this is what the
22 regulations don't say. Somebody has to do that.

23 MS. SCOTT: They are not supposed to give an
24 opinion as to the law.

25 THE COURT: It's not an opinion as to the law.

1 What it is is that there was a statute that was
2 passed, or the FDA has regulations. This is what
3 the regulations are, okay?

4 And then they would say you either complied
5 with those regulations or you didn't, here is the
6 reason you didn't comply with those regulations. I
7 don't know why that -- I don't think that is what
8 would disqualify the testimony.

9 MS. SCOTT: To say whether or not the
10 defendants complied with the law or comply with the
11 regulations?

12 THE COURT: Whether or not you met the FDA
13 regulations. That's what experts do all the time
14 experts. Experts come in all the time and they say
15 this is the law as it relates -- this is the law as
16 it relates to standard of care.

17 Did the plaintiff meet that standard of care?
18 No. Why not? And this is why they didn't meet it.

19 MS. SCOTT: But Your Honor, we are not talking
20 about standard of care that requires expert
21 testimony. We are talking about here is a cited
22 regulation, here are some words in the cited
23 regulation, and let me interpret the legal meaning
24 of these words. So whether or not something has
25 been, for example, misbrand or adulterated --

1 THE COURT: But ma'am, if you all don't
2 agree -- in other words, I would understand that if
3 you're telling me, Judge Thomas, we agree what the
4 rules and the regulations are and we agree to how
5 they are to be applied. But when you don't agree,
6 then somebody has to come in.

7 They may give one interpretation, you may give
8 another interpretation, but the only other way --
9 because how are the jurors going to know what to do
10 unless you're telling me that I, as the judge, have
11 to basically say here are the regulations that
12 apply, this is what the regulations mean, and then
13 you argue what actually happened. But otherwise, I
14 don't know how it's done.

15 MS. SCOTT: It is the province of the Court to
16 instruct the jury on the law.

17 THE COURT: But the problem is you don't
18 agree. I'm going to have a mini trial and you all
19 are going to basically come in and you are going to
20 testify to me what the FDA regulations are, what --
21 so I have to decide these are the regulations. So
22 I'll then say, okay, these are the regulations that
23 apply to this case. That may be the easiest part
24 of this.

25 Then the next question is going to be what

1 Johnson & Johnson was doing. This is what Johnson
2 & Johnson was doing. Then you look at the
3 regulations, you look at what Johnson & Johnson was
4 doing, and you say Johnson & Johnson failed to
5 comply in this regard because the label required 14
6 point font; Johnson & Johnson didn't have 14 point
7 font.

8 The label required that you list out all the
9 ingredients of your product, Johnson & Johnson
10 didn't put all the ingredients of their product
11 there. What did they leave out? They left out
12 asbestos. They left out, you know, metals. They
13 left out all these other things.

14 Go ahead.

15 MS. SCOTT: Your Honor, the issue is we are
16 not going to be -- if I'm understanding you
17 correctly, we are not going to be fighting over --
18 we are not fighting over any ambiguity in the
19 regulations. The regulations are what they are.

20 You can't have an expert come and make the
21 legal opinion, have a legal conclusion that a party
22 complied or did not comply with those regulations.
23 That's pure legal opinion. She's tried it before
24 and courts have said no, you're not allowed to give
25 a legal opinion.

1 But unless you have other questions, I can
2 move on to the second bucket.

3 THE COURT: Go ahead.

4 MS. SCOTT: The second bucket, Your Honor,
5 contains Dr. Plunkett's opinions about the J&J
6 defendants' business practices. And so she plans
7 to tell the jury things like what J&J defendants
8 knew and when, opine on whether their actions were
9 reasonable --

10 THE COURT: There is another witness that is
11 going to testify to this?

12 MS. SCOTT: Yes, Your Honor, with, we believe,
13 the same sort of reading unambiguous documents in
14 order to put an expert spin to come to a
15 conclusion. And courts have likewise prevented
16 Dr. Plunkett from coming in and giving any express
17 opinions about defendants' motive or intent.

18 THE COURT: I don't understand what qualifies
19 Dr. Plunkett to come in -- I mean, I guess she's
20 not the, quote, unquote, historian of medicine or
21 whatever the last person's title they had, so what
22 allows her to look at documents and then come in
23 and say this is what Johnson & Johnson did and this
24 is when they did it? I'm trying to understand
25 that.

1 MS. SCOTT: We agree, Your Honor. She can't
2 come in here and do that, and that's what courts
3 have said. She can't come in and read documents
4 and speak to a party's motive or intent. Such
5 opinions are speculative.

6 The Echevarria case that I mentioned earlier
7 from the California trial court said Dr. Plunkett
8 is not qualified to opine on corporate behavior.
9 She's a pharmacologist. Plaintiff can put into
10 evidence documents and testimony to show corporate
11 activity and they can argue that. They don't need
12 an expert to be on the stand --

13 THE COURT: I don't know if they can even put
14 that in through her. I'm assuming somebody gave
15 her some documents and she looked at the documents
16 and she is going to come in and testify, okay,
17 Johnson & Johnson did this and Johnson & Johnson
18 did that. I don't know how that informs her
19 ultimate opinion.

20 All right. We'll hear from them in a minute.

21 What is the next one?

22 MS. SCOTT: Just to take a step back on the
23 FDA regulations, in addition to it being improper
24 legal opinion, she's just not qualified to opine on
25 FDA regulations. She's never worked for the FDA,

1 she's never been an employee, she's never consulted
2 for, she's not speaking on their behalf.

3 THE COURT: So what you're telling me is all
4 she really is doing is reading the regulations and
5 saying whether or not you complied with them?

6 MS. SCOTT: Yes. As a pharmacologist, she --

7 THE COURT: She's never applied the
8 regulations, she's never been in charge with
9 enforcing the regulations, she didn't write the
10 regulations? So she is just doing -- she has a
11 nice degree and then she is reading the regulations
12 and she is saying this is what they are because I
13 read them, and this is what Johnson & Johnson did
14 or did not do because I know the facts of the case?

15 MS. SCOTT: Precisely, Your Honor.

16 THE COURT: All right. What's the third
17 bucket?

18 MS. SCOTT: The third bucket is one we've
19 spoken about before, particularly with
20 Dr. Freidenfelds, and that is Dr. Plunkett's
21 narrative testimony based on unambiguous documents.
22 Again, plaintiff's counsel wants to put her on the
23 stand to interpret and put an expert spin on our
24 company documents. She has a track record of doing
25 that in other cases.

1 THE COURT: I don't understand. Let's turn it
2 in for a minute because it's the same argument and
3 I need you to help me understand because I don't
4 understand how -- she is a pharmacologist?

5 MS. SCOTT: Yes, Your Honor.

6 THE COURT: I don't understand how this
7 person, being that, gets to basically look at the
8 regulations, and then come in and say what they
9 are, and then come in and say how they didn't
10 comply with the regulations. Then I also don't
11 know how they then get to look at their corporate
12 documents and say what they knew or what they
13 should have known. I don't understand how she's
14 qualified to do that.

15 MS. O'DELL: Well, let me take a step back and
16 really explain maybe a little bit more fully what
17 my counterpart did what her qualifications are.

18 She is a toxicologist. She has a Ph.D.
19 in pharmacology. She also is a -- she's an FDA
20 regulatory specialist; she has a certification for
21 that.

22 She's been in this industry for 25 years where
23 she has consulted with cosmetic manufacturers, even
24 back in 1990 when the condom manufacturers were
25 addressing the question of talc, and whether talc

1 is a hazard, she consulted then to condom
2 manufacturers. So she is someone who has been in
3 the industry and has been interacting with the FDA.
4 She's never been employed by the FDA, but I'm not
5 sure to be a regulatory expert you have an
6 employment at the FDA.

7 What she has been is she is certified in that
8 area. She has been consulting --

9 THE COURT: Certified in what area?

10 MS. O'DELL: As an FDA regulatory specialist.

11 THE COURT: What is that? I don't know what
12 that means.

13 MS. O'DELL: I think it's just a certification
14 through the Food and Drug Administration.

15 THE COURT: To do what? A certification that
16 allows you to do what?

17 MS. O'DELL: To consult -- to understand the
18 regulatory framework and to consult with companies
19 and assist them as they are interacting with the
20 FDA. Consultants are hired all the time by
21 manufacturers, both in pharmaceuticals, cosmetics,
22 and others, in order to understand the regulatory
23 framework and interact with the FDA and what's
24 required under FDA regulations.

25 In this case, it is particularly important to

1 have someone speak to the cosmetic regulatory
2 framework because it's not like a pharmaceutical
3 where drug companies are required to establish
4 safety, demonstrate that to the FDA, go through
5 certain testing protocols in order for a product to
6 be on the market. That's not the way cosmetics
7 work.

8 Cosmetics work where it's the company's duty
9 to ensure the safety of their product, ensure --
10 and it's all on the company. They have no duty to
11 have the product approved by the FDA before it goes
12 on the market. They have no duty to test it. They
13 have no duty to send adverse event reports to the
14 FDA like you would have in a pharmaceutical or
15 medical device. It's a very different regulatory
16 environment.

17 And so what Dr. Plunkett can do is assist the
18 jury in understanding, okay, whatever you heard
19 about FDA in other context and think you know it,
20 that's not how cosmetics work, and here are some of
21 the principles. For example, 740.1 is one of the
22 regulations, and it says that a cosmetic shall bear
23 a warning to prevent a health hazard that may be
24 associated with a product.

25 THE COURT: But in other words, I've heard

1 counsel say that nobody disagreed with what the
2 regulations say. The regulations say what the
3 regulations say.

4 The question is about you then go one step
5 further and you then have your doctor say that
6 Johnson & Johnson failed to comply with that
7 regulation, and they are saying how is she
8 qualified to then basically tell the jurors that we
9 failed to comply with the regulation when all she's
10 really doing is reading the regulation and then
11 accepting some facts that I guess the plaintiff put
12 in front of her, and then saying, okay, they didn't
13 comply because they didn't do this and they didn't
14 do this?

15 MS. O'DELL: It's more than that. She has
16 gone through as a toxicologist and pharmacologist,
17 and she's done a risk assessment to determine if
18 there is a hazard associated with Johnson's baby
19 powder. And based on that finding, her opinion
20 that there is a hazard, she has said a reasonable
21 company in the same circumstance would have
22 provided a warning that Johnson's baby powder can
23 cause ovarian cancer.

24 Her opinion is going to be, to your point, a
25 standard of care opinion. As a reasonable company,

1 based on this information that they had internally,
2 and based on the regulation, a reasonable company
3 would have had added a warning. That's one of the
4 things that she will say.

5 She will say her opinion is that the presence
6 of asbestos and fibrous talc in the product not on
7 the bottle is consistent with the FDA definition of
8 misbranding. Because if you branded it
9 appropriately, you would have those ingredients.

10 Lastly, a cosmetic product with no benefit --
11 we are not talking about a drug where you are
12 weighing risk and benefit. You are talking about a
13 cosmetic benefit that has a risk of causing a
14 deadly cancer. Like in the case of Ms. Seskin.

15 And in that setting when you have the presence
16 of asbestos, that's an adulterated product. That
17 is consistent with the FDA standard of it being
18 adulterated.

19 So what Dr. Plunkett has done, similar to
20 Dr. Freidenfelds, but in totally different focus,
21 her focus is on the regulatory interaction between
22 Johnson & Johnson with not only the FDA, but also
23 the national toxicology program.

24 THE COURT: But I don't understand. If the
25 standard of care, if you're testifying that she's

1 really a standard of care expert --

2 MS. O'DELL: In many respects. Regulatory
3 standard.

4 THE COURT: I understand.

5 If she is coming in and testifying that they
6 failed to meet the standard of care for the
7 labeling of products, or for -- I don't know
8 exactly what the standard of care is, or any other
9 company with the information that Johnson & Johnson
10 would have put these items on their product, and
11 the failure to do that is falling below the
12 standard of care. And the standard of care are the
13 FDA regulations?

14 MS. O'DELL: Well, yes, Your Honor. They fail
15 today act reasonably because they didn't warn, and
16 the basis for that is what the FDA has said is
17 required for warning, which is a hazard that may
18 cause. It's not that you have to prove beyond a
19 reasonable doubt.

20 THE COURT: But she doesn't get to say that.
21 That's your argument.

22 MS. O'DELL: She is not going to say that.

23 THE COURT: But see, I think that -- and the
24 fear that I have is that that's the way you all use
25 these experts. And you use these experts kind of

1 to basically direct the jurors to the ultimate
2 conclusion that you want. And I'm not talking
3 about -- I'm talking about the legal conclusion
4 that you want.

5 And I think that's part of what this motion is
6 about. I'm getting a little uncomfortable because
7 it's almost like the expert is telling the jurors:
8 Accept these facts, and I'm the expert and I'm
9 going to tell you what the law is, and this is the
10 conclusion that you should draw. And that's really
11 called summation by the lawyers at the end of the
12 trial.

13 Now, I guess part of this is saying that,
14 well, what is stopping her from being able to come
15 in and say that they fell below the standard of
16 care for labeling and here is why they fell below
17 that standard of care. And I'm not sure what there
18 would be to stop her from saying that.

19 The problem though is that, in doing that, she
20 is actually going to provide opinion testimony as
21 to what the regulations are and how those
22 regulations are to be applied. That may be part of
23 the problem of how is she qualified to do that.

24 MS. O'DELL: Well, she is qualified in the
25 sense that she does this when she consults with

1 cosmetic manufacturers and she does that all the
2 time, but Your Honor, you can't do that in a
3 vacuum.

4 THE COURT: But you didn't argue to me -- oh,
5 no, they argued to me about Publix.

6 MS. O'DELL: But you cannot do that in a
7 vacuum. If there is going to be a standard of care
8 and they failed to act reasonably because they did
9 not provide information on the bottle about the
10 constituents or about a warning, it cannot be in a
11 vacuum. She has to have a basis to offer the
12 opinion.

13 THE COURT: I agree. I think what you're
14 saying to me is that her testimony is they failed
15 to act reasonably on the labeling of the bottle
16 because they failed to put the ingredients on the
17 product on the bottle.

18 Well, what requires them to put the label on
19 the bottle? The FDA regulations require that.

20 Okay. And then the FDA regulations are there.
21 Or she could say FDA regulations section 4332-1,
22 okay? And then she says that's the basis of my
23 opinion. But I don't know if she can say anything
24 beyond that.

25 MS. O'DELL: We are not offering her to say

1 beyond that. We are offering her to say they did
2 not have a warning. I think she can say that,
3 that's a fact. The bottle has never had a warning.

4 THE COURT: So the bottle never had a warning?

5 MS. O'DELL: Zero warning for the entire time
6 it was on the market. Never mentioned ovarian
7 cancer. No warning.

8 Your Honor, we would put her forward to say
9 here is the bottle. It's never had a warning.
10 This is my opinion about hazard and the hazard this
11 product creates. The FDA regulation requires when
12 there is a hazard that may be associated, you shall
13 warn. That would be -- and the failure to do that
14 is the failure to act responsibly or reasonably.

15 THE COURT: Okay. I'm not sure I have a
16 problem with that.

17 So what about their documents that you intend
18 to --

19 MS. O'DELL: Well, this is a complicated,
20 complex story. It happens over 50 years. And
21 Dr. Plunkett has looked at thousands of documents.
22 She's had, similarly to Dr. Freidenfelds, access to
23 our database. She's been studying this issue for
24 almost seven years, I think. And she has read
25 these documents and to put in context what J&J

1 knew, when they knew it, just the facts, and what
2 that means from a regulatory standpoint.

3 THE COURT: But I don't understand.

4 MS. O'DELL: For example --

5 THE COURT: No, ma'am. It's one thing for me
6 to allow a historian to do that, but then if you're
7 just basically telling me you can just go find an
8 expert -- and by the way, they call your expert --
9 they say her job has been basically -- she's
10 testified 150 times since 2003 in deposition and
11 trial.

12 So you can't possibly stand there and tell me
13 you can find a reputable expert, and then you then
14 basically give them all the information you can
15 give them about the company, and they basically get
16 to introduce all of that evidence and say, well,
17 they should have known.

18 MS. O'DELL: But Your Honor --

19 THE COURT: Do it through your historian. Do
20 it through that medical historian that you talked
21 about. It shouldn't be that I allow it to come in
22 over their objection. I'm not turning every single
23 witness that you intend to call here into some
24 historian about what people knew or should have
25 known. No. I think that's going too far.

1 MS. O'DELL: Yes, sir. Let me just draw the
2 distinction between Dr. Plunkett and
3 Dr. Freidenfelds.

4 Dr. Freidenfelds is going to talk about
5 marketing, the communication to women as consumers.
6 You heard that argument.

7 Dr. Plunkett is very different. She is going
8 to be talking about J&J and the talc supplier,
9 Imerys, their interaction with regulatory agencies
10 and what they were saying to regulatory agents,
11 what they were not saying to regulatory agencies,
12 how that affected --

13 THE COURT: I'm sorry to say this: Who cares
14 what she thinks about what they were doing and who
15 they were talking to? The issue is whether or not
16 their product fell below the standard of care.

17 You don't get, as an expert, to come in here
18 and say, oh, and you know how I know their product
19 fell below the standard of care? I found a memo
20 from them. Oh, I found a communication where they
21 said this or they said that, so they knew that this
22 should have happened.

23 No. She is a standard of care expert. She is
24 not somebody -- I'm not turning this trial, or any
25 other trial that I'm turning into, is where you

1 have somebody -- and I agreed with you on the
2 historian because I think that's appropriate in
3 light of what I heard. I just don't think that's
4 the same thing here.

5 And you're right, there is a distinction
6 between these two witnesses, and one is just a
7 professional who has not studied the historical
8 documents except for purposes of this litigation.
9 The other one has basically looked back at all of
10 these documents from a historical perspective and I
11 think that's different.

12 MS. O'DELL: Well, I will say this,
13 Dr. Plunkett --

14 THE COURT: Please don't talk me out of the
15 other decision that I made with the other
16 historian.

17 MS. O'DELL: I will not. I promise I won't.

18 But I will say that when you're talking about
19 what Dr. Plunkett intends to testify to in terms of
20 J&J's documents to put them into context, and that
21 is -- and I'll give you an example.

22 THE COURT: I don't know what that means.

23 MS. O'DELL: I'm trying to explain, Your
24 Honor. Maybe I'm not being quick enough.

25 But the National Toxicology Program considered

1 talc and whether it was -- should be regulated as a
2 carcinogen, and so there are documents associated
3 with that process in the '90s and the 2000s, and
4 that's a regulatory interaction. And what
5 Dr. Plunkett's opinion is, based on her review of
6 the documents, how they essentially circle the
7 wagon and put the full court press on to prevent --
8 and I'm talking about Johnson & Johnson and Imerys,
9 the talc supplier.

10 When they worked to ensure that in 2000, that
11 talc would not be listed as a carcinogen, despite
12 the evidence that was in place at that time,
13 including their knowledge that there was asbestos
14 in talcum powder, J&J knew that. And J&J was
15 working day and night to ensure that the National
16 Toxicology Program would not --

17 THE COURT: What gives her authority to come
18 in and say that?

19 MS. O'DELL: She would say from a regulatory
20 standpoint, because she's dealt with the National
21 Toxicology Program as well, as part of her work as
22 a regulatory specialist, she would say Johnson &
23 Johnson's lack of candor to the National Toxicology
24 Program, the way they worked to ensure that talc
25 was not listed as a carcinogen was not consistent

1 with a responsible company because in the face of
2 that evidence, and in the face of the regulatory
3 framework, what they would have done is said we are
4 going to war because there was significant
5 evidence, including asbestos evidence, that talc
6 could cause ovarian cancer.

7 So that is a regulatory sort of event that she
8 is specially equipped for to explain. That is
9 because she has regulatory expertise. She has
10 dealt with the National Toxicology Program, she's
11 dealt with the FDA, she's dealt with other
12 regulatory agencies.

13 And so for her to be able to evaluate how they
14 started --

15 THE COURT: Too far. I think you're going too
16 far with her. I am not permitting her to come in
17 here and testify looking at their documents, and
18 after looking at their documents, talking about
19 what they knew or should have known, what they
20 should have done.

21 She can testify about -- and I'll hear from
22 you if you want to be heard on this.

23 She can testify about whether or not they
24 violated the standard of care. She can testify
25 about how she concluded that they violated the

1 standard of care because the regulation says this,
2 they failed to comply with the regulation.

3 And to be honest with you, I believe you said
4 something, and I'm trying to remember what you
5 said, I believe she may be even -- this is what I
6 want to hear from you about -- she may be even able
7 to testify about the things that Johnson & Johnson
8 knew and the things that they did not as it relates
9 to the standard of care, and that information was
10 not -- I mean, that information did not lead them
11 to put it on the label.

12 But this idea of Johnson & Johnson knew this,
13 so they lobbied for this, or Johnson & Johnson knew
14 that, and so they went and tried to circumvent this
15 over here, she can't testify to any of that. None
16 of that.

17 You want to respond?

18 MS. SCOTT: Yes, Your Honor. I'll start with
19 your last point first.

20 We would disagree that anyone would be able to
21 come in and talk about what J&J knew, we talked
22 about that. But to Your Honor's earlier point,
23 Dr. Freidenfelds, these are her opinions. I mean,
24 she is going to come in here and talk about what we
25 were aware of in the '60s, '70s.

1 THE COURT: No. No, she's not. She's not.
2 She's not. I think she can talk about the standard
3 of care. I think she can say --

4 Now, I think if you're talking about standard
5 of care in the sense as to the labeling and your
6 failure to put the warnings on the labeling in
7 violation of -- arguably, in violation of FDA
8 regulations, if there is a memo that is -- or some
9 statement that says -- and I rarely think this is
10 there, but it can be something akin to this: Hey,
11 you know the FDA requires us to put the ingredients
12 on our labels, but in order to do that, that's
13 going to cost us this amount of money, so let's not
14 do it. Well, if we don't do it, that's going to be
15 a violation of our standard of care. Well, we
16 don't care, we'll wait until we get caught.

17 If there is that memo that's there, I think
18 she can make reference to it. But if she's just
19 basically taking memos and she's associating it
20 with your conduct or your behavior or a regulation,
21 I don't think she can do that.

22 MS. SCOTT: That's what she intends to do,
23 Your Honor, and so -- but earlier, I was making the
24 point that all the things that they want to do with
25 Dr. Plunkett, to Your Honor's point, they can do

1 with Dr. Freidenfelds. All of her opinions track.

2 But on the FDA point --

3 THE COURT: Because she's a historian, I
4 overruled the objection and I'm not preventing you
5 from -- to the extent that this witness can
6 actually testify about documents that were in
7 Johnson & Johnson's possession and control that
8 went to this issue, I'm not preventing that
9 historian from talking about those documents.

10 I'm stopping this witness from talking about
11 those documents because I think you are utilizing
12 this witness in a manner that is inconsistent with
13 her expertise.

14 Go ahead, you were saying.

15 MS. SCOTT: Thank you, Your Honor.

16 Just to touch on the FDA point, this whole
17 standard of care, I think it's a Trojan horse. I
18 think it's a backdoor way to get in a pure legal
19 opinion, but the point I'll make is, again, she's
20 not qualified to do this. Again, she's a
21 toxicologist. Drugs is her game, okay? Not
22 cosmetics.

23 THE COURT: She said that she's consulted with
24 companies on --

25 MS. SCOTT: She has consulted, perhaps, but on

1 drugs.

2 THE COURT: They told me it was on also on
3 warning labels.

4 MS. SCOTT: And there is an instance in the
5 '90s, I think I heard condoms, which is a medical
6 device, not a cosmetic.

7 But in any event, not only is she unqualified,
8 her methods are unreliable. So, for example, the
9 FDA interpreted its own regulation related to talc
10 baby powder in 2014. It said labels aren't
11 required.

12 In addition, she does things like say the FDA
13 doesn't regulate cosmetics. That's not true.

14 THE COURT: Well, didn't they say labels
15 aren't required unless they -- did it say they may?
16 And so they didn't actually say you don't have to
17 put labels on, they actually said that you may be
18 required to put labels on if your product does
19 these things?

20 MS. SCOTT: The FDA, in response to a
21 citizens' petition in 2014 that said, hey, FDA,
22 talc baby powder should have labels on it. The FDA
23 wrote back, said we looked at things, we checked it
24 out, they don't need to put labels on. The science
25 isn't there. They don't need to put labels on this

1 Johnson & Johnson baby powder.

2 THE COURT: Did they say they don't need to
3 put labels on unless this? Or did they just say
4 no, you don't have to put labels on?

5 MS. SCOTT: They don't have to put labels on.

6 THE COURT: That's the FDA?

7 MS. SCOTT: That was the FDA's response to a
8 citizen petition who said, FDA, take a look at
9 this.

10 THE COURT: So I don't understand then. How
11 is this person coming in testifying that the FDA
12 requires labels if the FDA says you are not
13 required to have labels?

14 MR. OLIVER: Your Honor --

15 MS. O'DELL: Let me.

16 Your Honor, that is a mischaracterization of
17 what happens with a citizens' petition, with
18 respect. The citizen's petition asked for a
19 specific label in 1998. It was not, "Please warn
20 about ovarian cancer generally."

21 This was a petition that was filed by the
22 Cancer Prevention Coalition, and it was not acted
23 on until 2014, and that's part of what I would put
24 forward with Dr. Plunkett.

25 THE COURT: What would happen in 2014?

1 MS. O'DELL: In 2014, there was a letter from
2 the FDA that said we have looked at the evidence
3 and we don't believe this label that was suggested
4 to us is appropriate based on what they viewed at
5 that time. But it was not a comprehensive view of
6 the data and it's certainly not the data that we
7 have now.

8 THE COURT: But my question, ma'am, is: Has
9 the FDA ever required Johnson & Johnson to put a
10 label on the talc -- is it talc baby powder, baby
11 powder?

12 MS. O'DELL: Johnson's baby powder with talc,
13 Your Honor, and FDA cannot require a label under
14 the cosmetic regulation that was in place. They
15 cannot require a label.

16 It is the manufacturer's duty to put the label
17 on the product. The only way they can require --
18 and, you know, this may seem shocking to you, it
19 sort of was to me when I got in the case, but the
20 FDA could not require a label unless they went to
21 court and sued a manufacturer in order to
22 require --

23 THE COURT: But if they thought it was serious
24 enough and causing the type of harm that you all
25 are speaking of, then isn't it their obligation to

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1 go to court and make sure that a label is placed on
2 the product? And the fact that they didn't put a
3 label on the product --

4 See, here is what I'm concerned with. I'm
5 concerned with -- you're using the FDA regulations
6 through this particular witness, but nowhere are
7 you going to say that the FDA required them to put
8 a label on their product.

9 You're saying, I think, that Johnson & Johnson
10 fell below the standard of care because knowing
11 what they know, a reasonable manufacturer would
12 have put the label on their product. But the law
13 didn't require them to put the --

14 MS. O'DELL: We did, Your Honor.

15 THE COURT: Tell me how.

16 MS. O'DELL: I'm sorry, forgive me for saying
17 this again, but the regulation says it's not "may."
18 It says -- and this is to the manufacturer.

19 It says in 740.1 that I mentioned before, it
20 says it shall bear a warning. That's the duty of
21 the manufacturer. "It shall bear a warning to
22 prevent a health hazard that may be associated with
23 a product."

24 THE COURT: So help me understand what that's
25 saying. Are you telling me the FDA has a

1 regulation that says that it places the
2 responsibility on the manufacturer; if the
3 manufacturer is aware that there is a hazard of
4 their product, although the FDA doesn't say put a
5 label on your product, they are saying that if you
6 learn that there is a hazard associated with your
7 product, you must put a label on the product?

8 MS. O'DELL: It says shall. "Shall bear a
9 warning to prevent a health hazard that may be
10 associated with your product."

11 That's what the standard is. And because it's
12 a cosmetic -- and there are thousands and thousands
13 and thousands of cosmetics on the market. They go
14 on the market every day. They are unregulated.
15 They are often untested.

16 The FDA can't say, hey, I'm going to look at
17 everything on the shelf and I'm going to bring a
18 lawsuit every time I think there's going to be a
19 warning.

20 THE COURT: I know, but they can do it once
21 the public becomes aware of the level of the hazard
22 as you all -- you want to have a historian come in
23 here and you're going to have a historian tell us
24 about all they should have known, not ten years
25 ago, not 15 years ago, not 20 years ago. So I'm

1 sorry, this is not -- this whole idea people
2 started becoming alarmed about this issue of talc,
3 it wasn't just yesterday.

4 So it's one thing to sit up here and say that
5 somebody just put a product on there and nobody is
6 complaining about it, but this particular product
7 was on their radar. And so they absolutely could
8 have gone to court and sued based upon the
9 information and all the testing that was being
10 done. You all are telling me they started doing
11 this testing a long time ago; it wasn't just within
12 the last five, ten years.

13 So I don't accept that. But I'm not sure that
14 I disagree with you in the context of the FDA
15 doesn't require cosmetic products to immediately
16 have a label, but the FDA standard says that if you
17 learn, okay, that your product is hazardous, or may
18 be hazardous, you shall place a label on, then I
19 think the FDA, in essence, is assaying, okay,
20 manufacturer, your failure to do that would fall
21 below the standard of care that is required of you,
22 even though we are not going around telling Johnson
23 & Johnson and Procter & Gamble to put a label on,
24 we are telling you basically the onus is on you.

25 MS. O'DELL: 100 percent. It is

1 self-regulated and --

2 THE COURT: What do you want to say?

3 MS. SCOTT: Your Honor, I mean, just going
4 back to the FDA has already said particularly and
5 specifically about Johnson & Johnson's baby powder,
6 they said the citizens who were saying, hey, look,
7 there is this issue with ovarian cancer, they said
8 we want a "may cause" label. And the FDA said we
9 looked at the science, no, we are not saying that
10 Johnson & Johnson has to do that.

11 And of course, I mean, the FDA has the
12 authority to enforce its own regulations.

13 THE COURT: But that doesn't change what
14 counsel is saying. Counsel is saying that whether
15 the FDA chose not to put a specific label or adopt
16 a specific recommendation as to a label, that's one
17 thing, but the FDA regulation, even without the
18 adoption of that specific request, the FDA
19 regulations still say that if you become aware that
20 your product is hazardous, you shall put the
21 necessary warning labels on your product.

22 So I haven't heard you say that's not what the
23 regulations say. Is that what the regulation says?

24 MS. SCOTT: I'm not sure, Your Honor, but I
25 know the FDA was interpreting its own regulations

1 when it did this.

2 But in any event --

3 THE COURT: Did what?

4 MS. SCOTT: When the FDA responded that there
5 is no label necessary on Johnson & Johnson's baby
6 powder.

7 THE COURT: But that doesn't mean -- they
8 didn't release you from the standard of care that
9 is already in the regulation. They, according to
10 plaintiff's counsel, they passed that on to you.
11 They said, you know, we are not going to take on
12 that immediate responsibility, but we are willing
13 to pass that on to you and make the manufacturer
14 responsible.

15 MS. O'DELL: I'm happy to --

16 THE COURT: One minute. I'm still over here.

17 MS. SCOTT: I'm just reading from the FDA's
18 response on this, but Your Honor, to the extent
19 that this goes to some legal opinion wrapped into a
20 standard of care and our awareness, I think
21 Dr. Plunkett, not only is she not qualified because
22 cosmetics is not what she is an expert in, even if
23 she has some consulting experience, that does not
24 make her an expert in it. But to the extent
25 awareness and all that and knowledge is relevant,

1 her testimony would be cumulative because
2 Dr. Freidenfelds is going to come in here and give
3 that testimony about what we knew, when we knew it,
4 at various points in time.

5 THE COURT: I agree, and that's why I'm not
6 going to allow it. I'm not going to allow
7 cumulative testimony and I'm not going to allow
8 this particular witness -- I think if they are
9 going to introduce about what you knew and when you
10 knew it, that testimony should come in through the
11 historian who is testifying.

12 But I'm not excluding this witness from
13 testifying about the standard of care, and that
14 includes being able to make reference to the FDA
15 regulations. I will allow that to be part of that.
16 And if there are -- that doesn't mean I'm saying
17 that she can't refer to documents that go to the
18 standard of care, because I don't know what that
19 is. And I'm assuming they told you what documents
20 they were.

21 MS. SCOTT: Quite frankly, Your Honor, I don't
22 know what the standard of care is when you're
23 talking about a legal regulation that we are not
24 challenging that what the words say. I don't know
25 what the standard of care is.

1 And to the extent we are talking about some
2 industry standard of care, she is not in the
3 industry. This is not her industry. She is not an
4 expert. She is completely unqualified to give
5 these opinions.

6 THE COURT: What's the standard of care in
7 what industry?

8 MS. O'DELL: Well, it would be in cosmetics,
9 and how a reasonable cosmetic company would have
10 conducted themselves under these circumstances with
11 the information that they had available.

12 THE COURT: I'll accept that.

13 MS. O'DELL: So, Your Honor, just to be clear
14 because I want to make sure that I understand,
15 there are certain documents that provide facts for
16 Dr. Plunkett in terms of her standard of care
17 opinion. So, for example, if there is a document
18 that J&J sent to the FDA that had certain
19 representations about the safety of the product,
20 and that's not consistent with what was known in
21 the literature, the scientific literature, can
22 Dr. Plunkett testify to that? She has testified --

23 THE COURT: What does the document say?

24 MS. O'DELL: It would be, for example, there
25 is -- that it is safe and there is no evidence,

1 credible evidence that it causes ovarian cancer.

2 We would say that that's not true and that's not
3 been true for decades.

4 THE COURT: But why don't you introduce that
5 through your historian? Meaning, the only purpose
6 of this witness is to say that there is a standard
7 of care, and that standard of care to the extent
8 that the -- or I don't even know if she can
9 actually even say that it causes cancer.

10 MS. O'DELL: She is not going to testify as to
11 cause. That will be Dr. Ness and Dr. Chan.
12 Dr. Ness will give a general causation opinion.

13 She is a toxicologist, and so based on that,
14 she would testify to the mechanism, part of the
15 mechanism for how it can cause cancer, the
16 migration through the fallopian tubes, and that
17 talc and its constituents can cause inflammation,
18 that's sort of the mechanism by which we put
19 forward that talc can cause cancer; that if it's
20 applied to the genital area, it can ascend the
21 genital tract, reach the ovaries and fallopian
22 tubes, et cetera.

23 THE COURT: You want to have the
24 pharmacologist testify to that?

25 MS. O'DELL: She's a toxicologist as well.

1 She studied in that area. That's very much within
2 her area of expertise to do that.

3 THE COURT: I always love when you use these
4 witnesses and they can tell us when the sun is
5 going to come up and where the moon is going to go
6 down. Okay. So you were asking me for guidance?

7 MS. O'DELL: So, for example, the FDA letter
8 that counsel for Johnson & Johnson mentioned,
9 that's something typically that Dr. Plunkett would
10 speak to. What does the letter say, what was known
11 in the scientific literature at that time, and
12 whether they acted as a reasonable company in
13 response to that process.

14 Because there were two citizens' petitions,
15 there's evidence that Johnson & Johnson
16 collaborated with somebody at the FDA, that they
17 actually ended up -- that person went to work with
18 a lobbying group on behalf of cosmetics, and
19 there's a whole back story of why the FDA did what
20 they did.

21 THE COURT: Who is going to tell us that back
22 story?

23 MS. O'DELL: Well, Dr. Plunkett has done that
24 in the past because it's from a regulatory --

25 THE COURT: Let's keep it in the past. I

1 don't think she should be coming in and telling us
2 a back story about how the FDA did anything. Why
3 is she qualified to testify about what the FDA did
4 and why they did it?

5 MS. O'DELL: Your Honor, she has done what
6 experts do; and that is, they looked at corporate
7 documents. She puts them in context for the jury
8 to help explain what was happening, what Johnson &
9 Johnson -- the information they had, what they were
10 doing, not their thoughts, what they were actually
11 doing, and put that in context for the jury so they
12 would understand it in terms of the regulatory
13 framework. And I think it's clearly within the
14 case law that --

15 And 3M is an example. You know, they explain
16 the basis of their admissible opinion through
17 commenting on documents and evidence that have been
18 produced in litigation.

19 If they want to cross-examine her that she
20 hasn't looked at enough documents, or she's omitted
21 a document in giving her opinion, then so be it.
22 Let them examine her.

23 But she has looked at thousands of documents
24 and synthesized her opinions based on that
25 evidence, and so for that reason, Your Honor, as it

1 relates specifically to the regulatory
2 interactions, I believe that Dr. Plunkett is not
3 only qualified, but she can comment on those
4 documents in a way that speaks to was Johnson &
5 Johnson acting as a reasonable company.

6 And that's what she's done in other cases,
7 what I would do here. It would be narrow. It
8 would not in any way overlap with Dr. Freidenfelds.
9 It would be focused on the regulatory aspects.

10 MS. SCOTT: Your Honor, not qualified. I just
11 want to take the example that my friend on the
12 other side said about the letter, what Dr. Plunkett
13 would say about the letter.

14 She would say what it says; the jury doesn't
15 need that. She would say what was known. You can
16 show another document. Dr. Freidenfelds, she will
17 establish what was known at that time, right?

18 And then were they reasonable, and I'm
19 struggling, Your Honor, to figure out what is the
20 basis. And I'm going back to our conversation on
21 Monday with the Publix expert and whether that
22 expert was qualified to talk about a reasonable
23 standard, when all she had -- at least she had some
24 retail experience, 30 years.

25 Dr. Plunkett doesn't have any experience.

1 She's been a consultant dibbling and dabbling with
2 all sorts of things, mostly on the drug side. So
3 what qualifies her as an expert under the Daubert
4 standard to come in here and tell jury what is
5 reasonable for Johnson & Johnson to do? I'm
6 struggling with it.

7 THE COURT: Well, what they're saying is that
8 it's cosmetic, it's really cosmetic companies, and
9 she has consulted -- I'm being told that she had
10 consulted with this issue of what you put on a
11 label, what you don't put on a label, and then she
12 has also worked with the FDA. And so what she has
13 coming in and saying is that this is what the FDA
14 says, and Johnson & Johnson fell below the standard
15 of care as required by the FDA because they knew
16 their product had become hazardous, and once they
17 knew their product had become hazardous, in
18 accordance with the FDA, they were required to put
19 the labels on their product. They didn't do that.

20 And so I don't imagine it's that much of a
21 stretch to say -- like she is not coming in and
22 saying that, okay, I work for Johnson & Johnson, or
23 I work for a company like Johnson & Johnson. What
24 she is saying is that there is a standard of care
25 in relation to when labels need to be placed on the

1 product.

2 That standard is really set out with the FDA,
3 which places the responsibility on the
4 manufacturer, and this is what the manufacturer is
5 supposed to do when they become aware. Johnson &
6 Johnson became aware -- and she has to be able to
7 say when she thinks -- based upon the documents
8 that I reviewed, this is when I believe Johnson &
9 Johnson became aware, and Johnson & Johnson should
10 have properly labeled their product once they
11 became aware that it was hazardous. They didn't do
12 it.

13 I don't know why that is a stretch. Now, I'm
14 not allowing much beyond that, but I'm overruling
15 the objection as to much beyond that, but I am
16 going to allow her to provide the opinion as
17 articulated by counsel and attempted to be
18 articulated by the Court consistent with that.

19 MS. SCOTT: Could I just?

20 THE COURT: You can.

21 MS. SCOTT: Please, Your Honor.

22 I mean, she has no cosmetic experience. I
23 mean, it would be better if we knew what cosmetic
24 company she actually consulted with, but we don't
25 know that.

1 Moreover, Your Honor, if we're talking about
2 if she did a project as a consultant 30 years ago,
3 you got me on threshold issues earlier this
4 morning. Is five enough to be an expert in the
5 cosmetic industry? Is it ten? Surely we don't
6 have five, we don't have ten.

7 She's not an expert in this field to even
8 opine on what is reasonable. I think that's my
9 hangup, Your Honor, particularly in light of our
10 conversation on Monday. There is no basis for her
11 to give that opinion.

12 THE COURT: What is she is an expert in?

13 MS. O'DELL: She is an expert in pharmacology
14 toxicology and regulatory affairs. And we've
15 talked about that in terms of is --

16 THE COURT: All right, I'm not going to go
17 through it again. We can sit here all day.

18 MS. SCOTT: One more point, Your Honor,
19 please.

20 THE COURT: Go ahead.

21 MS. SCOTT: The court in Echevarria listened
22 to Dr. Plunkett give testimony for two days, and
23 the only thing he said with regard to her FDA
24 opinion that she got out that was salient to him in
25 those two days was that she took a couple of FDA

1 courses.

2 THE COURT: That's it?

3 MS. SCOTT: That's all that's written in the
4 opinion, Your Honor. In the opinion, he says --

5 THE COURT: So her experience in FDA
6 regulations is that she took a couple FDA courses?

7 MS. O'DELL: I would disagree with that, Your
8 Honor.

9 MS. SCOTT: That's what was salient to the
10 court.

11 THE COURT: Where is the resume? Where is the
12 curriculum vitae that she is going to tell us about
13 when she gets on the witness stand and testifies?

14 MS. O'DELL: Let me get it, Your Honor.

15 MS. SCOTT: Your Honor, if I may show you the
16 Echevarria opinion --

17 THE COURT: Who is this from?

18 MS. SCOTT: It's from a trial court in
19 California.

20 THE COURT: Oh, but I don't do anything
21 with --

22 MS. SCOTT: I know how you feel about trial
23 courts, Your Honor, but this trial court --

24 THE COURT: I can make an error the same way
25 they made an error.

1 MS. SCOTT: Understood, Your Honor.

2 MS. O'DELL: Your Honor, that's one case.
3 She's testified in state court in Georgia, state
4 court in Philadelphia, state court in --

5 THE COURT: Florida?

6 MS. O'DELL: This is the first ovarian cancer
7 case in Florida, so she has not testified in
8 Florida yet. She has testified in Florida in other
9 cases, but not in a talc/ovarian cancer case.
10 She's testified in Missouri state court.

11 I mean, they are focused on that decision. I
12 understand she did testify in that case to much of
13 what we've talked about today. Part of her opinion
14 was not allowed in regard to talking about 740.1,
15 but we believe the court erred --

16 THE COURT: This particular judge said that
17 she's taken a few courses and she may have given
18 advice, but she is not qualified to opine as to FDA
19 regulations or their applicability to labeling.

20 MS. SCOTT: I'll just --

21 MS. O'DELL: We disagree with that opinion,
22 Your Honor.

23 THE COURT: But there is no basis for it. I
24 mean, there is not a lot of detailed explanation as
25 to --

1 MS. SCOTT: The basis, Your Honor, was two
2 days of testimony. And I'll also add --

3 THE COURT: Oh, this is after he actually took
4 the testimony from the witness?

5 MS. SCOTT: Yes, Your Honor. And in addition,
6 what --

7 THE COURT: This is at trial or before trial?

8 MS. SCOTT: I believe this is --

9 MS. O'DELL: Do you have a copy for me?

10 THE COURT: A Daubert motion was filed before
11 trial. So it had to have been because they're
12 saying she may not give a legal opinion, so it
13 couldn't have been -- it had to have been before,
14 because otherwise, it would have said the court is
15 striking the testimony or something like that.

16 MS. O'DELL: And there was a new trial ordered
17 in that case after the verdict. But the point, I
18 mean, if you're talking about qualifications --

19 THE COURT: Let me just stop you. I'm going
20 to keep my ruling the same, but it's with this
21 danger, and I keep saying this and lawyers always
22 want to test me; they're saying, will he really do
23 that? I will.

24 If your witness takes the witness stand and I
25 find that she is not qualified to give the opinion

1 that she's given, I will send the jury out. I
2 won't let them start the cross-examine. I will
3 send the jury out and I will tell you what I'm
4 about to do, and when the jury comes back in, she
5 will be gone and I will tell them to disregard
6 everything that she just said.

7 MS. O'DELL: I understand, Your Honor. What
8 is reflected in her expert report was reflected in
9 her CV is that she has expertise in cosmetics for
10 all the reasons I've said.

11 THE COURT: I'm allowing you -- the objection
12 is overruled -- well, granted in part, denied in
13 part. I'm allowing you to present her, but it's
14 with that caveat that if I think --

15 And by the way, I will not grant a mistrial.
16 I will not -- don't ask me for a mistrial if I
17 strike your witness because this is something that
18 you have total control over. You know what her
19 background is. You know what her experience is.
20 And I may not know the full breadth of it. I'm
21 assuming you have the transcript from when she's
22 testified in this case, so you know what she
23 testified to.

24 What year was this?

25 MS. O'DELL: 2017, I believe.

1 THE COURT: Okay, so that was about seven
2 years ago. So you know what it's going to be.

3 So if it's consistent with what was found in
4 this order, then there is no reason to believe that
5 my decision should be any different. And the only
6 difference is that's done before trial and I'm
7 doing this -- I would be doing this during trial,
8 and you cannot argue to me that you are prejudiced
9 because now one of your key witnesses has just been
10 stricken.

11 MS. O'DELL: I understand.

12 THE COURT: Next?

13 MS. O'DELL: Thank you.

14 MS. SCOTT: Thank you, Your Honor.

15 THE COURT: Let's go.

16 MR. OLIVER: We are going to take their motion
17 to exclude Dr. Chan so we can get that out of the
18 way. It's the last one.

19 THE COURT: Okay.

20 MR. CARUSO: Thank you, Your Honor.

21 We are going to move again to strike the
22 general causation opinion of Dr. Chan on similar
23 grounds, and additional grounds as to what we spoke
24 about with Dr. Ness earlier about the differences
25 between primary peritoneal and ovarian cancer, but

1 I don't know if we need to rehash that again.

2 The next piece that I want to talk about more
3 specifically, and I think more importantly, is his
4 opinions as to Dr. Seskin in this case, his
5 specific cause opinions in this case. And the way
6 Dr. Chan went about concluding that talc was the
7 cause of Dr. Seskin's ovarian cancer, he described
8 as a differential diagnosis or etiology going
9 through the different types of causes ruling them
10 in, ruling them out, and he described his own
11 method as nonmathematical, which is fine.

12 But it becomes quite apparent what he means by
13 that when you go through what he ruled in, what he
14 ruled out. Understanding that differential
15 etiologies are generally something that we are not
16 going to quibble over as to whether they are a
17 reliable method, but the way he applied it is
18 completely unreliable.

19 So he himself testified that he ballpark the
20 risk ratio for talc and ovarian cancer between 1.22
21 and 1.36 is the risk ratio. So 22 to --

22 THE COURT: What does ballpark mean?

23 MR. CARUSO: He looked at a group of about
24 five different studies. There's about 40 and he
25 looked at the ultimate risk ratios in there and he

1 said generally, they are about 1.22 to 1.36. He
2 didn't describe any further as to how he arrived at
3 that conclusion, but that was his conclusion.

4 And then he has this process of ruling in. So
5 he rules in talc as one of them. He then rules in
6 her diaphragm usage. So when he says talc is
7 contributing to ovarian cancer, his opinion as to
8 that is perineal usage. So putting it in the
9 underwear, applying it to the genital area, that's
10 perennial usage of talc.

11 He then says her diaphragm usage of talc put
12 her at an increased -- and even greater risk. He
13 thinks that's up there with the highest risk. And
14 when asked, well, what basis do you have to say
15 that, he says, well, I think it makes intuitive
16 sense, and I have this Penacolinski study from
17 2018.

18 THE COURT: He really said it's intuitive?

19 MR. CARUSO: Yes, he says it's intuitive. And
20 here is the most incredible thing about this: When
21 you go to the study he cites, it does not report an
22 increased risk ratio. It's protected.

23 There is not a single study out there, not one
24 that you can point to that looks at diaphragm usage
25 and identifies it as a risk. There are nine.

1 Eight of them have no statistically significant
2 association, the other most recent one actually
3 finds a statistically significant protective
4 effect.

5 He has absolutely no basis to say increased
6 risk. That's what he rules in. So he has talc,
7 ballpark, 22 to 36 percent. Diaphragm usage, not
8 even close on data. It's a huge analytical gap.

9 Then we go, okay, what did you rule out? How
10 did you determine that absent those things, what
11 did you rule out as other potential causes?

12 Well, let's go through some of them. First,
13 we asked him about hormone replacement therapy,
14 which he didn't even know about. There is a whole
15 body of literature published in Lancet in 2015 --

16 THE COURT: Did she have hormone replacement
17 therapy?

18 MR. CARUSO: Yes. There are records here,
19 Your Honor, I mean, incredible records from her
20 time getting treated by Dr. Travin, her
21 gynecologist. So 18 years of hormone replacement
22 therapy, and this was at the begrudge of some of
23 her doctors because she took this into her own
24 hands.

25 I'm passing up to the Court two different

1 medical records one from 2012, one from 2013 where
2 they note --

3 THE COURT: I can't read that.

4 MR. CARUSO: Well, you can read this, Your
5 Honor, I believe. That says "way too high," and
6 it's in reference to her hormones; her estrogen,
7 described there as estradiol, and her testosterone.

8 And in 2015, the Lancet published a review of
9 51 different epidemiological studies and they
10 conclude that there was strong suggestive evidence,
11 not just of a correlation, but of a causal
12 relationship between hormone replacement therapy
13 and ovarian cancer. And I can pass up that study
14 to you as well.

15 Dr. Chan wasn't even aware of this. He didn't
16 know it was a risk. He knew there were some risks
17 confer odd the breast cancer, but he had no clue
18 about ovarian cancer. And to his credit, we don't
19 doubt his credentials as a treater, as a good
20 treating oncologist, but he testified at a
21 deposition in 2020 that, well, I'm not really too
22 good at looking at associations and determining
23 cause.

24 THE COURT: He's an expert or a treater?

25 MR. CARUSO: In this case, he is their general

1 and specific causation expert. He never treated
2 Dr. Seskin.

3 THE COURT: Okay.

4 MR. CARUSO: So he admits himself that he's
5 not very good at looking at this type of literature
6 and looking at associations and finding causation
7 evidenced by that.

8 Then we asked him, okay, so you didn't know
9 about that, what about her history of
10 endometriosis? In your report, Dr. Chan, you cite
11 a study, Saavalainen I believe is how you pronounce
12 it, where individuals with the type of
13 endometriosis that Dr. Seskin had puts you at a
14 37 percent increased risk of ovarian cancer.

15 Well, you know, I don't think that applies
16 here. I ruled that one out as a significant cause
17 too, higher than his own risk ratio for talc.

18 THE COURT: Did he say why he ruled it out?

19 MR. CARUSO: He says that it's more so for
20 clear cell cancer, which it does have a higher risk
21 ratio in that study, but his own study -- so he
22 dismisses it as less important in the serous type,
23 which Dr. Seskin had, and more so in the clear
24 cell, which is fine and true under the terms of
25 that study, but also in that study, a higher risk

1 ratio reported than for his own estimate as to
2 talc. Well, I rule that out. I don't think it's
3 too substantial.

4 Okay, fine. What about age? Dr. Seskin was
5 66 years old when she was diagnosed with ovarian
6 cancer. In your own report, Dr. Chan, you cited a
7 paper that for individuals with serous type
8 cancers, there is a 4 percent increase year over
9 year every year above the age of 50.

10 She was 66 when she was diagnosed; 16 times
11 four is 64 percent increased risk for ovarian
12 cancer. How did you rule that out as a possible
13 cause?

14 Well, you know, I don't think it's an
15 independent cause. Why not? I just don't think
16 it's an independent cause.

17 Okay, Dr. Chan. What about protective
18 factors? Because not only are there risk factors
19 for ovarian cancers, there's also protective
20 factors, things that women can have or don't have
21 that reduce their risk. Let's go through some of
22 the things that Dr. Seskin had.

23 She never had children. Children, so when you
24 have a child, obviously you stop ovulation for a
25 period. The running theory is that is what reduces

1 a woman's risk of ovarian cancer because you cease
2 to ovulate for that period of time resulting in
3 lower damages to the ovary, in theory, and that's
4 what reduces it in the literature that he cites in
5 his report. Never had that, so no protective
6 factor there.

7 Never took oral contraceptives, right?
8 Another 30 to 40 percent reduction in ovarian
9 cancer. She never took oral contraceptives,
10 undisputed. Well, you know, who cares.

11 When we have breastfeeding. Never had a
12 child, so obviously never breastfed. Another thing
13 in his report that he just ignores.

14 So essentially, he has this whole process,
15 this differential etiology of going in -- he rules
16 in talc at 22 to 36 percent chance, he doesn't even
17 acknowledge really that the diaphragm studies are
18 contradicting --

19 THE COURT: All right, you are going back over
20 it.

21 What do you want say?

22 MR. PENDELL: Thank you, Your Honor.

23 Counsel is being selective with the facts,
24 telling you the things that he thinks are important
25 that support what he's trying to do here and

1 ignoring everything else.

2 Okay. So let's start first. Dr. Chan is not
3 really going to talk about general causation other
4 than, obviously, the general causation undergirds.
5 For example, he has read and is familiar with and
6 has given general causation opinions -- by the way,
7 in the motion, they like to talk about the Monroe
8 case all the time. Because that's his general
9 causation opinion, that was another case he
10 testified in Georgia. And although I understand
11 Your Honor is free to rule whatever you want
12 because this is Florida, but Georgia does recognize
13 the Daubert standard, it is what they used.

14 And what they never tell you is he was
15 permitted to testify on general causation in that
16 case. I watched his testimony. I'm happy to send
17 you the link. It's actually quite good.

18 Some of the things he explains in that case,
19 for example, he talks about age. They like to talk
20 about age. Well, he didn't consider her age.

21 He did consider her age, and what he says in
22 the Monroe case is, yes, age is a factor, but here
23 is why age is a factor: It's not just because you
24 are old, you get cancer. The longer you live, the
25 longer you are exposed to environmental factors and

1 all the other types of things that happen to you.

2 So age combined with things like talc use, or
3 all these other types of things, that all sort of
4 goes -- that's why in this case he completely rule
5 out age, okay?

6 THE COURT: He is going to say that in this
7 case, he doesn't rule out age?

8 MR. PENDELL: He'll say he can't completely
9 rule out age, he absolutely will say that. But
10 here is the good news for me: The standard is not
11 he has to subtract every other possible cause. The
12 rule is a substantial cause, and there can be
13 multiple substantial causes. So even if what
14 counsel is telling you is true, it doesn't mean
15 that talc also was not a substantial cause.

16 Now, on the endometriosis thing, it is not
17 just -- it is true he is going to tell you, and the
18 literature backs this up, the serous type, the type
19 of endometriosis that they want to suggest that she
20 would have had, is a different cell type. But
21 there's controversy in the records as to whether
22 she even had that.

23 It's my turn, thank you.

24 She had a medical record that says they had
25 exploratory surgery to see whether or not she had

1 it. We have no pathology report. We have nothing
2 else that says definitively she had it add all.

3 So he takes that into consideration and says,
4 well, look, I don't know 100 percent that she had
5 this. In any event, it's, to me, something that I
6 can rule out because of the cell type of this
7 cancer that she had, and endometriosis cell types
8 are usually clear, not the serous.

9 He looks at -- and by the way, Dr. Chan, just
10 a little bit about his background: Not only has he
11 been a doctor, he's a gynecologic oncologist. He
12 treats thousands of women for these very types of
13 conditions, ovarian cancers.

14 And by the way, ovarian cancers, going back to
15 what was talked about before, if you asked him:
16 Dr. Chan, as a gynecologic oncologist who does this
17 more multiple years, teaches medical students at
18 Dartmouth -- very good school -- Stanford -- very
19 good school -- University of California San
20 Francisco -- pretty good school, not as good as the
21 other two probably -- and he is going to tell you
22 that ovarian cancer at large includes cancer of the
23 fallopian tube, cancer of the ovaries, cancer of
24 the peritoneal.

25 This is all ovarian cancer. He treats women

1 for this. This is what he does.

2 He is going to say that he looked at all the
3 things that could possibly be causes, he weighed
4 them, and I appreciate that opposing counsel has
5 not satisfied that he has ruled stuff out to the
6 same extent that they would like it to have happen,
7 but he did what doctors do in the real world, which
8 is when you're trying to figure out what causes
9 somebody to have cancer, you have to think about
10 all the things that you know that cause cancer.

11 So he looked at those studies because he does
12 believe talc causes cancer. He says that not only
13 was he taught that in medical school, he teaches
14 his medical students that. He tells his wife and
15 his daughters not to use talc.

16 He does say when he treats his own patients,
17 although he doesn't do an epidemiological study --
18 and by the way, let's step back for a moment on
19 that. They make a lot of hay out of the fact that
20 he says things in his testimony about the studies,
21 well, I'm not very good at doing that. He's not an
22 epidemiologist. He does not get down as an
23 epidemiologist does and write studies about
24 population level data, but that doesn't mean that
25 he is unqualified to do this analysis as a treating

1 physician. And if that were the test, as Your
2 Honor knows, having tried tobacco cases and all
3 these other types of cases, no pulmonologist, no
4 cancer doctors would be allowed to testify because
5 they don't do epidemiology. They read and rely on
6 studies, just like everybody else does.

7 The fact is that they are quibbling with his
8 conclusions, not his methodology. If they have a
9 problem, if they think that there is something that
10 he did not consider as a differential factor that
11 he should have, that's cross-examination.

12 He explains what he looked at, why he looked
13 at those, what the evidence said about it, and why
14 we could rule them in or rule them out. That is a
15 differential diagnosis.

16 THE COURT: Do you want to reply?

17 MR. CARUSO: Yes, I do.

18 So, first, I want to talk a little bit about
19 what he mentioned about Dr. Chan's testimony as to
20 age and why you get more cancer is because of
21 environmental exposures. He's testified that one
22 of the reasons why it increases is because as you
23 age, DNA is prone to making more errors. More
24 replications occur, which is a known cause of
25 cancers, DNA replication errors.

1 Second, he talks about endometriosis being a
2 controversial diagnosis in this case. It is not a
3 controversial diagnosis. The plaintiff's fact
4 sheet, she listed it as a prior medical history.
5 Nobody has quibbled over that in her medical
6 records over 30 years after the diagnosis.
7 Dr. Chan's point was that there was not a confirmed
8 pathological finding of that, and if we want to go
9 back to pathology, the pathology is --

10 THE COURT: Well, respond to counsel's
11 argument. I don't want to get bogged down into
12 what he did or didn't testify to, but counsel said
13 something and shook my head and said yeah, but I
14 want you to tell me why it's no.

15 Counsel said that, okay, these other things
16 may be deemed to be substantial causes, and he may
17 not have maybe even properly considered them, but
18 that does not mean that he cannot testify that the
19 talc was a substantial cause of the injury that is
20 being complained of. So let's assume that you're
21 right and he didn't; you tell the jurors that, you
22 cross-examine him on that, and the jurors can
23 basically say that either based upon what I'm
24 hearing, I don't find that talc was a substantial
25 cause of the injury, or they can find that, well,

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1 maybe there were these other causes that were
2 substantial causes, but that included talc.

3 Because it doesn't -- and there is a jury
4 instruction we normally give that talks about
5 although you may identify other causes, if you can
6 still glean that this is a substantial cause --
7 what's your response?

8 MR. CARUSO: I have two responses to that,
9 Your Honor. One, Dr. Chan's mechanism of action in
10 this case, his theory as to how talc causes cancer
11 relies on what we describe as an inflammation
12 theory, right?

13 So essentially their position is talc is
14 applied to the vaginal area, it goes up through the
15 vagina, up through the reproductive tract, lands on
16 the ovaries, causes inflammation, and that's what
17 induces the cancer. That's the theory.

18 So we asked Dr. Chan, well, do you have any
19 evidence at all that there was inflammation in
20 Dr. Seskin's body? No, not at all.

21 Well, how can you come in here and say that
22 inflammation was the cause of it? Well, it's just
23 not in the medical records.

24 That's fine. Well, okay, not in the medical
25 records, we agree there is no evidence of

1 inflammation for Dr. Seskin specifically, and
2 that's fine to have your general causation theory
3 for inflammation, but specifically not for
4 Dr. Seskin.

5 And then he does not -- so he goes, okay, he
6 concedes none in the medical records, but there are
7 two pathologists in this case who went in and
8 looked for inflammation, and there is no signs of
9 inflammation, and that's sort of independent
10 because he didn't even look at those reports. He
11 had the capacity to go look at the pathology
12 reports and confirm his own theory and he did not
13 do it.

14 THE COURT: So I don't understand. So are you
15 telling me that I should exclude a witness if they
16 didn't feel it was necessary to review certain
17 types of evidence because their opinion is no
18 longer reliable based upon the facts? I'm trying
19 to understand your argument.

20 MR. CARUSO: No, the reason to exclude him is
21 because he has -- his whole theory rests on
22 inflammation occurring in Dr. Seskin. Cancer being
23 induced by inflammation. There is no evidence of
24 inflammation in this case. None.

25 And if he wants to have a general theory as

1 to, okay, inflammation causes cancer generally,
2 that's fine, and we'll be happy to have him talk to
3 that as a general causation expert. But as to
4 Dr. Seskin --

5 THE COURT: All right. So what they're saying
6 is that the problem is that it's not that he is
7 generally speaking about causations of cancer, he
8 is being very specific about what caused the cancer
9 in this case, which was the presence of
10 inflammation?

11 MR. CARUSO: Correct.

12 THE COURT: But counsel is arguing but there
13 is no evidence of any presence of inflammation. I
14 think what counsel is arguing is that he is taking
15 a general theory and he is applying it to the
16 specific facts of this case and saying that the
17 general theory applies to your plaintiff.

18 MR. PENDELL: Counsel is mixing and matching
19 general causation with specific causation, and as
20 Your Honor has thankfully, I'm very happy you've
21 made abundantly clear since I've known you on
22 Monday, you are not going to allow cumulative
23 testimony.

24 Dr. Chan is not a general causation expert
25 here. He is not going to get up there and talk

1 about general causation.

2 And by the way, counsel's statement that there
3 is no evidence that she suffered any inflammation,
4 that's incorrect because Dr. Sitelman is going
5 to -- he is our expert. He is going to get up
6 there and say that he saw it in her pathology
7 slides in the PLM.

8 THE COURT: There is going to be evidence in
9 the records that she suffered from inflammation?

10 MR. PENDELL: Correct. He is going to say he
11 saw it in the slides. So that's number one.

12 Dr. Chan's role here is not to sit here and
13 say this is the mechanism by which cancer is caused
14 because that's general causation and we are not
15 going to give cumulative testimony. His job is
16 after that general testimony has come in, he is
17 going to come in and he is going to say -- now he
18 could do that if we were putting him up as a
19 general causation expert. We are not.

20 He is going to come in and say I looked at all
21 the things that this lady was exposed to that could
22 have potentially contributed to her cancer; age,
23 endometriosis, the BRCA 1 and 2 genes, talc. Based
24 on all the information I've seen, the testimony,
25 her medical records, I believe that talc

1 substantially contributed to her cancer.

2 Cancer gets caused -- one of the ten key
3 characteristics of a carcinogen, there's a famous
4 doctor that I happen to be friends with who came up
5 with these ten key characteristics of carcinogens,
6 and one of them is if a chemical compound is
7 capable of or causes inflammation in a human being.
8 As part of the general causation analysis, I do
9 expect that you are going to hear that one of the
10 things --

11 THE COURT: Not from Dr. Chan.

12 MR. PENDELL: Not from Dr. Chan, but from
13 another doctor, you are going to hear that the talc
14 causes inflammation in parts of this area, and that
15 is what causes the cancer.

16 THE COURT: Do you want to respond?

17 MR. CARUSO: Yes.

18 So I didn't get to the second prong of the
19 significant factor, right? So you said why is it
20 that he can't come in here and say, well, talc is
21 just one of many significant contributing factors.

22 THE COURT: Substantial.

23 MR. CARUSO: Substantial. Because it's not
24 reliable for an expert to look at other causes with
25 conceded higher risk ratios than talc and dismiss

1 them as substantial causes, and then look at one
2 that he himself identifies as a lower risk and say
3 that one is significant.

4 You can't hold both of those opinions in your
5 hands at the same time. It's not reliable
6 application of the methodology.

7 THE COURT: Well, isn't that for -- the jurors
8 can either reject his opinion and his explanation,
9 or they can accept it or they can do any -- I guess
10 anything that's in between. We tell the jurors
11 that.

12 Just because an expert testifies, they are
13 tree free to accept the opinion, reject it, or give
14 it whatever weight they deem it deserves. And when
15 you cross-examine him and he says I discounted
16 these other substantial causes because I'm
17 attributing this substantial cause, but I can't
18 rule out or I can't include these other substantial
19 causes, the jury can decide whether or not that's
20 appropriate and whether or not they want to make an
21 allowance for that when they award whatever amount
22 of money they award --

23 MR. CARUSO: Well, that's true, Your Honor.

24 THE COURT: -- whether zero or something
25 higher.

1 MR. CARUSO: But what an expert can't do is
2 come and offer testimony that there is such an
3 analytical gap between the information that they
4 are interpreting, such as the diaphragm studies,
5 for example. Ruling that in, he thinks that puts
6 her at an increased risk because it makes intuitive
7 sense.

8 When you look at the data, it's just not
9 there, and you can't just come in here and offer
10 pure opinion.

11 THE COURT: You didn't say anything about the
12 diaphragm. I didn't see you say anything about the
13 diaphragm study. He said your doctor is going to
14 come in and testify that as it relates to the
15 diaphragm study and whether or not it's an
16 increased risk, the increased risk ratio, he is
17 going to say it's intuitive.

18 MR. PENDELL: Well, again, stepping aside from
19 cherry-picking of testimony, and I'd like to look
20 at the testimony again and come back to you tell
21 you exactly what he said. But, look, the use of
22 talc in the vaginal/peritoneum area causes an
23 increase in cancer.

24 So in addition to using that talc, putting it
25 on, putting it on her diaphragm, collectively all

1 those things increased her risk of getting cancer.
2 They are going to say the studies say what they
3 say, our experts are going to say -- there's
4 clearly disagreement what the experts say about --

5 THE COURT: But I don't understand. An expert
6 is actually going to come in and testify in
7 response to somebody asking the question about
8 their ability to -- or what is the basis for them
9 actually testifying to a set of facts as an expert,
10 and the expert responds, well, it's just intuitive,
11 you've got to explain more. You can't just say
12 it's intuitive, can you? I don't know what that
13 means.

14 MR. PENDELL: Can I see the testimony?

15 MR. CARUSO: Yes. I have a copy for you. The
16 intuitive statement is on page 138.

17 And I have a copy for you as well Your Honor.
18 That's where the testimony begins.

19 THE COURT: Well, no, he doesn't say it's just
20 intuitive. He says it's intuitive, and then he
21 explains, "By placing the talc powder closer to the
22 cervix, which is near the diaphragm, on the
23 diaphragm, it would enhance the exposure, increase
24 the risk based on just the anatomical location of
25 the cervix and placement of the diaphragm."

1 So what he's saying is -- yeah, he did say
2 it's intuitive, but what he's saying is that you're
3 putting it in closer proximity to the area that is
4 susceptible, that is prone to basically developing
5 cancer.

6 MR. CARUSO: But that's pure opinion
7 testimony. There is no data. This is the study he
8 relies upon. I'll hand this up. This is pure
9 opinion testimony not permitted under Daubert.

10 He can't just say it because he thinks that's
11 what's going to happen. That's not what happens,
12 and the evidence shows it. This is a
13 meta-analysis, so there's a total of nine
14 individual studies looking at this diaphragm usage.

15 So essentially, physicians used to tell
16 patients to dust your diaphragm in talc to keep it
17 clean. That's what Dr. Seskin alleged she did and
18 that's how we get here.

19 And studies have looked at this, right? Are
20 women who do this, are they at an increased risk of
21 ovarian cancer? They find the opposite. There is
22 risk ratio under one; it sits at about .8. There
23 is not a single study that Dr. Chan can point to
24 that is going to show something different because
25 it doesn't exist. And he can't just say, well, I

1 think it should exist. It makes intuitive sense to
2 me.

3 THE COURT: So what you're saying is that
4 putting the talc on the diaphragm and then
5 inserting the diaphragm to the point that it is
6 closer to the internal organs, that there is no
7 evidence or any study that he can point to that
8 says that that increases the risk of inflammation?

9 MR. CARUSO: 100 percent correct.

10 MR. PENDELL: Untrue, Your Honor.

11 So, again, going back to the actual testimony
12 where he explained why it is -- because you are
13 going to hear about something else in this case, in
14 general causation that, by the way, Dr. Chan is
15 able to talk about and would talk about if we were
16 doing cumulative evidence called migration. And
17 what happens is when they put talc in their body,
18 it migrates through that part of the body.

19 THE COURT: Who is saying this?

20 MR. PENDELL: All of our medical experts will
21 say this if given the opportunity.

22 THE COURT: Is Dr. Chan going to say this?

23 MR. PENDELL: If you let him say that, he
24 absolutely will.

25 THE COURT: Go ahead.

1 MR. PENDELL: And there are studies that back
2 it up. Even the FDA agrees that migration is a
3 phenomenon that actually happens.

4 So the idea you can take it and put it on your
5 diaphragm and put it up there in that cavity, it's
6 absolutely plausible and the science backs it up
7 that it could migrate throughout that part of her
8 body. And you are going to hear evidence of that.
9 He testified to that. That is in his testimony
10 about that phenomenon.

11 They are quibbling with his conclusions. They
12 don't like his conclusions.

13 THE COURT: Okay, but the migration occurs.
14 Does that mean it increases your risk ratio?

15 MR. PENDELL: Of course it increases your risk
16 ratio, Your Honor, because it's a dose-response
17 relationship. The more you have over the longer
18 period of time, the more your risk goes up. He
19 will talk about that as well.

20 So the short answer is yes, it increases your
21 risk.

22 THE COURT: All right. The Court, having
23 heard from all parties, fully considered the
24 arguments of all counsel. The motion is denied.

25 We only have about ten more minutes, so do the

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1 substantive motions in limine that have something
2 to do with opening statements or jury selection.
3 What else do we have?

4 MR. OLIVER: Your Honor, I've got one. Is it
5 our choice or your choice?

6 THE COURT: It's yours. Go ahead.

7 MR. OLIVER: Okay. The defendants have moved
8 to exclude evidence of the International Working
9 Group on Asbestos in Consumer Products, it's called
10 the IWGACP. And I think that comes up in opening,
11 I'm trying to remember. I'm not sure.

12 But the point is this: In, I think, 2020,
13 right after the FDA found asbestos in Johnson's
14 baby powder, they got this group of top scientists
15 together. It was eight separate agencies, federal
16 agencies, EPA, FDA, OSHA, NIOSH, National Institute
17 of Health, and some others, National Geological
18 Service. There is one in there I never even heard
19 of.

20 But all the agencies got together and they
21 formed this international working group, and the
22 working group was tasked with a couple of things.
23 One of the things they were tasked with doing --
24 and I referenced this with Dr. Rigler -- was coming
25 up with some testing methodology.

1 What is the standard way that we identify
2 asbestos, right? So they issued a document that
3 recommended the testing procedure that Dr. Rigler
4 used more or less.

5 THE COURT: Who are these people?

6 MR. OLIVER: They are top scientists in the
7 country gathered up by the federal agencies. I
8 don't know who they are.

9 MS. O'DELL: Subject matter experts.

10 MR. OLIVER: They are just subject matter
11 experts that the FDA reached out to. We have the
12 names of them, that's all publicly available
13 information.

14 So they get together. They go out and
15 interview people, they ask for comment period, as
16 it typical, and they got comments. Some of the
17 comments they got were from Dr. Rigler. They end
18 up adopting the testing procedure that Dr. Rigler
19 advocated for that some other people advocated for.

20 They also said that statement that I talked
21 about earlier with regard to this debate between
22 asbestiform fibers and cleavage fragments. They
23 said we think that the majority of the evidence or
24 something -- the quote is in our brief -- the
25 needlelike shape of the product is what matters,

1 not necessarily its chemical composition. And
2 that's not the only place that comes up, there is
3 actually defendant documents that acknowledge that
4 that is a problem.

5 THE COURT: Okay. What is the relevance of
6 this document?

7 MR. OLIVER: The relevance of this document is
8 that our experts intend to rely on it and they will
9 talk about --

10 THE COURT: For what purpose?

11 MR. OLIVER: So Dr. Rigler will rely on it
12 because he is going to talk about the fact that the
13 needlelike shape, as opposed to just the chemical
14 composition, is one of the reasons asbestos is
15 dangerous. Because they are going to cross him on
16 it. They are going to ask him about --

17 THE COURT: Where was this document published
18 at?

19 MR. OLIVER: Did you say where?

20 THE COURT: Where?

21 MR. OLIVER: I think it's in the federal
22 register. It's publicly available.

23 THE COURT: So it's authoritative?

24 MR. OLIVER: Absolutely.

25 MS. SCOTT: No, Your Honor.

1 THE COURT: Who says it's authoritative?

2 MR. OLIVER: Our experts.

3 THE COURT: They say it's authoritative?

4 MR. OLIVER: Yes, they will say it's
5 authoritative. Our experts will, their experts may
6 not.

7 MS. SCOTT: Your Honor, this working group
8 paper was just that; it was a working group, it was
9 an executive summary, it's preliminary. I think it
10 expressly says this does not represent the
11 recommendations or the policies of the FDA, I think
12 somewhere else, it might say something like
13 shouldn't be relied on.

14 But it's irrelevant and plaintiffs can't
15 backdoor -- it's also hearsay, Your Honor. It's
16 not authoritative. It's not a public record. I'm
17 not sure it's even in the federal register, but you
18 might be able to Google it and find it on the
19 internet.

20 Plaintiffs can't backdoor this hearsay, not
21 authoritative, preliminary working group paper with
22 their experts. That's the law. And so we think
23 that it needs to be excluded on those bases.

24 THE COURT: So can I ask again: Where is it
25 published? You said it's authoritative.

1 MS. O'DELL: It is for sure on the FDA website
2 as an authoritative document that was put together
3 by this group of subject matter experts on testing
4 of asbestos from the federal agencies that
5 Mr. Oliver mentioned.

6 THE COURT: Ma'am, they are saying that it's
7 on the FDA website as an authoritative source.

8 MS. SCOTT: It's on the website, but the FDA
9 itself says these aren't our policies, these aren't
10 our recommendations, don't rely on them. So take
11 it for what it's worth.

12 THE COURT: Is that accurate?

13 MR. OLIVER: That part is, but can I give some
14 clarification for how we are going to use this?
15 Because you asked that, Your Honor, and I want to
16 be clear. It's very unlikely that I am -- first of
17 all, I'm not showing this to the jury in opening.
18 Not the document.

19 It's very unlikely that I will try to
20 introduce it as substantive evidence directly, but
21 what is going to happen is this issue is going to
22 become relevant because it's part of defendants'
23 defense. They are always going to bring up this
24 cleavage fragments and chemical composition and
25 needlelike shape. They argue about that a lot.

1 We don't think it matters our experts will
2 preemptively explain that that doesn't matter. And
3 they may use reference to that; if I say
4 Dr. Rigler, you know, tell me the basis for this,
5 he'll say, well, I was part of this.

6 THE COURT: I'm excluding it because the FDA
7 says that it is not to be relied upon for any
8 purposes. It's not an authoritative -- they are
9 saying it's not an authoritative source. It should
10 not be relied upon. I don't know how it becomes
11 authoritative.

12 MR. OLIVER: They didn't say it's not an
13 authoritative source.

14 THE COURT: Read to me.

15 MS. SCOTT: It says that it does not represent
16 recommendations or policies of the FDA or any other
17 federal agency or proposed changes any regulations
18 of the U.S. government. It also says that -- the
19 working group itself says neither this executive
20 summary, nor any other presentations at the public
21 meeting by members of the working group, represent
22 proposed or preliminary recommendations or policies
23 of the FDA or any other agency.

24 I will correct myself and say, since we cited
25 it in our response, it is in the federal register,

1 so I do apologize to my colleague, but it is not
2 authoritative. It is a bunch of people got
3 together and said, hey, here are our thoughts,
4 let's write them down.

5 THE COURT: I know, but that doesn't mean it's
6 not authoritative. Authoritative means that it is
7 somethings that relied upon by the professionals
8 within the industry, and the question -- that's the
9 question. Are professionals going to say we rely
10 upon this?

11 And I agree with you, I don't think it should
12 come in if the FDA is saying don't rely upon it,
13 but it doesn't sound like the FDA is saying it's
14 not authoritative. Because there could be
15 something that you had a group of reputable people
16 get together, they wrote a series of
17 recommendations; okay, now people within the
18 industry use that as the model for how they
19 actually make these decisions. Whether the FDA
20 chooses to accept it or not, the industry has
21 accepted it and I think then it becomes
22 authoritative.

23 MS. SCOTT: There is no evidence that the
24 industry has accepted it. And I'll also point out,
25 Your Honor, rule of evidence 706, that

1 authoritative publications can only be used during
2 cross-examination. So just because their experts
3 used it doesn't mean it's authoritative.

4 THE COURT: Well, I don't know how -- I'm not
5 here ruling about how -- counsel said he is
6 preempting and I don't know anything about how he's
7 preempting, but I'm not going to -- and I was
8 inclined to exclude it because you read it to me
9 and I thought, well, how could it come?

10 But because of the issue of it being an
11 authoritative source, I still think you're saying
12 it's not, counsel is saying it is, I mean, I guess
13 before -- so before you introduce it, I think they
14 have to lay the predicate that it's an
15 authoritative source. And if they lay the
16 predicate it's an authoritative source, I'll allow
17 it. If they fail to lay the predicate as an
18 authoritative source, I'll deny it.

19 MS. SCOTT: Given, Your Honor, that it needs
20 to have some sort of predicate, this working group
21 paper should not be mentioned in opening statement.

22 THE COURT: Correct.

23 MR. OLIVER: I actually made a mistake. I
24 wasn't planning on doing that anyway.

25 THE COURT: Next motion in limine?

1 MS. SCOTT: We are going to talk about the
2 voluntary recall.

3 THE COURT: Johnson & Johnson's voluntary
4 recall?

5 MS. SCOTT: Yes, Your Honor, our motion in
6 limine number seven.

7 Back in 2018, two years after Ms. Seskin was
8 diagnosed with her primary peritoneal cancer, the
9 FDA, through some testing, found very trace amounts
10 of chrysotile asbestos and a single bottle in one
11 lot of Johnson & Johnson baby powder. Subsequent
12 testing done, independent testing done revealed
13 that there was no asbestos in that lot, that it
14 might have been a contamination error, something of
15 that nature. However, we are seeking to exclude
16 that evidence as irrelevant.

17 THE COURT: Let me make sure I understand what
18 you just said. The reason for the recall was that
19 a batch of the product was suspected to have been
20 contaminated with asbestos?

21 MS. SCOTT: They thought one bottle in one lot
22 had trace amounts -- or the FDA thought one bottle
23 in one lot had trace amounts of asbestos.

24 THE COURT: So there was a recall as to that
25 batch?

1 MS. SCOTT: Just to that batch, Your Honor,
2 and it was a batch that was manufactured in 2018.
3 The recall was in 2019. All of this post-dates
4 Dr. Seskin's diagnosis of primary peritoneal
5 cancer, and so for that reason, it is irrelevant.

6 Moreover --

7 THE COURT: Let me ask them how they intend to
8 use it.

9 MS. STEMKOWSKI: Yes, Your Honor.

10 First off, it is relevant. It's relevant
11 because it shows defect and control by defendant.
12 So defendants testified just now that they had
13 possession of a lot that when it left their
14 factories, they found trace amounts of asbestos.

15 And it was the FDA who found it, that was an
16 independent laboratory called AMA Laboratories.
17 It's actually a dye scientists who they previously
18 hired as an expert.

19 So they find asbestos, they contact J&J. J&J
20 then goes and tests an aliquot, which is like a
21 sample of a sample. They test that bottle, or they
22 test that sample, and they find asbestos again, and
23 so they recalled this lot.

24 So that's what we're talking about but I want
25 to be really clear because the motion seems to talk

1 about both the FDA testing and the recall. So we
2 are focusing just or not recall right now and why
3 that's relevant. So it's to our defect and it
4 shows their control.

5 THE COURT: But it happened after your client
6 was diagnosed with --

7 MS. STEMKOWSKI: Sure, but Your Honor,
8 post-accident evidence is admissible in Florida.
9 So we have Murray v. Alvin Vineyards. That's a
10 Second DCA opinion from 1983. It's a fun opinion.

11 He was hit in the eye by a champagne bottle,
12 and afterwards, the company put a warning saying
13 don't shoot the champagne this way, and when they
14 got up to say, well, that label has nothing to do
15 with what happened to this gentleman, the plaintiff
16 was able to introduce evidence saying if they get
17 up and they say the product is safe -- which is
18 what they are going to do in this case -- and we
19 are able to impeach them with the evidence that
20 they've had to change the label, that this has
21 happened after the fact and it's relevant.

22 THE COURT: But I think it's something
23 different. I think if they get up there and they
24 say that we have never had asbestos in our product,
25 then I think you may be able to use that to

1 basically impeach them that is not true. In fact,
2 asbestos was found in your product on this time.

3 But if they basically just deny your
4 allegations without more, I don't think that opens
5 up the door to you introducing the fact that
6 asbestos was found in their product. I think it's
7 how they do it, how they choose to do it and
8 whether or not they open the door. If they don't
9 open the door, I don't think it's relevant.

10 MS. STEMKOWSKI: Your Honor, we have never
11 been in a case where they have not claimed that
12 their product is asbestos-free and 100 percent
13 safe. So if they get up and they do that, which we
14 anticipate they will, then this recall is
15 absolutely relevant.

16 THE COURT: As I just said, if they open the
17 door, then I will allow it in. When I say "open
18 the door," you cannot just do it and make the
19 decision that they've opened the door on their own.

20 You have to request a sidebar and you have to
21 say, Judge Thomas, I believe they've opened the
22 door consistent with your ruling. I now ask for
23 per in addition to go ahead and introduce evidence
24 as it relates to the recall.

25 MR. OLIVER: Could I do that post their

1 opening?

2 THE COURT: I'm sorry?

3 MR. OLIVER: The problem is I have to open
4 first as plaintiff and I know they're going to say
5 it, but when they say it, my opening is over. And
6 at that point, I can't talk to them.

7 THE COURT: Well, opening is not evidence
8 anyway. Opening is just what you believe the facts
9 are going to show.

10 Next?

11 MS. STEMKOWSKI: Thank you, Your Honor.

12 MR. OLIVER: For our choice, Your Honor, we
13 are going to do something, the discontinuation of
14 the marketing of their product in 2020 following
15 the recall.

16 MS. SCOTT: I'm sorry, which number is that?

17 MR. OLIVER: I don't know what number it is.
18 It's the fact that you guys stopped marketing your
19 product, stopped selling it, stopped making it, all
20 that, in the United States.

21 MS. SCOTT: Okay.

22 MR. OLIVER: While you are looking for that,
23 I'll explain it because we don't have a lot of
24 time.

25 So in May of 2020, after the recall, Johnson &

1 Johnson announced that it would no longer -- it did
2 not recall all of its existing stock. It announced
3 it would no longer sell talc-based Johnson's baby
4 powder.

5 In fact, if you go to their website now, or
6 Amazon or anything like that, you look and you say
7 why can't I get talc-based baby powder? Johnson &
8 Johnson has a statement we love your baby, so we've
9 decided it's the best thing in the world and our
10 science says, blah, blah, blah.

11 The point is this is relevant to the fact of
12 the defect. It makes it more likely that it's
13 defective and it fails the consumer expectation
14 test, because one of the things they are going to
15 show -- and it's in their PowerPoints. They have a
16 bunch of PowerPoints about why they discontinued
17 it.

18 So they blame the lawyers for that, but they
19 also say --

20 THE COURT: I'm sorry, they are going to
21 introduce evidence in this case as to why they
22 discontinued the baby powder product?

23 MR. OLIVER: Yes, they have a PowerPoint and
24 an executive who testifies about that, and she
25 talks about in her PowerPoints there are different

1 factors. One of the things they do is they blame
2 the lawyers --

3 THE COURT: I don't understand. Why then --
4 you are seeking to exclude that or you want to
5 include that?

6 MR. OLIVER: They are seeking to exclude it.
7 If you exclude it, I don't guess they'll talk about
8 it, right? They don't want to talk about it at
9 all.

10 But why is it relevant to our case
11 affirmatively? It is relevant to our case
12 affirmatively because it makes it more likely one
13 of our elements, which is defect. That's something
14 the jury could look at and say, well, wait, these
15 defendants have gotten up for however long and
16 they've told us this product is perfectly safe and
17 yadda, yadda, yadda, and this finding of --

18 THE COURT: How is that not subsequent
19 remedial measures? How is that not basically
20 saying that, okay, you brought it to my attention
21 and now we're going to take a corrective action,
22 and you can't use the fact that I've taken a
23 corrective action against me in a litigation?

24 MR. OLIVER: The reason that it's not
25 subsequent remedial measures is because the case

1 law that Ms. Stemkowski cited -- the reason it's
2 not subsequent remedial measures is because the
3 case law Ms. Stemkowski cited says that in Florida,
4 plaintiffs can use evidence of subsequent remedial
5 measures to show things like defect.

6 Now, if you're --

7 MS. SCOTT: That's actually --

8 MR. OLIVER: You're right, let me look at
9 this. Here is what the statute says: To prove
10 ownership or control or the feasibility of
11 precautionary measures, controversial or
12 impeachment, it allows us to do that for the
13 purpose of impeachment.

14 So when they come in and say our product was
15 perfectly safe and the FDA tested this a thousand
16 times -- and they say that, right? The FDA started
17 testing powders back in the '70s. Then we are
18 allowed to say, well, the FDA found it.

19 And when say that introduce those citizens'
20 petitions and they say the FDA said we didn't have
21 to warn, I'm allowed to turn around and say the FDA
22 found asbestos --

23 THE COURT: I'm sorry, I missed something.

24 MR. OLIVER: -- and you decided to discontinue
25 the product. They are sort of related.

1 THE COURT: The whole point was that you
2 wanted to introduce evidence that -- because they
3 voluntarily discontinued use of the product,
4 correct? No one made them do it. They voluntarily
5 did it.

6 MR. OLIVER: That's not true as to the recall,
7 but it is true as to the discontinuation.

8 THE COURT: That's my point. There is a
9 difference between maybe a mandatory recall as
10 compared to they are deciding that they are just
11 not going to manufacture the product in the United
12 States. Or anywhere, I don't know.

13 MR. OLIVER: It's both now.

14 THE COURT: Okay. So I just don't see -- I
15 just don't see the relevance of that or why --
16 well, first of all, I think you definitely can't
17 affirmatively use it.

18 I think depending upon what they say and
19 whether or not, again, they open the door, they
20 potentially may make it an issue, but
21 affirmatively, I don't think it comes in.

22 MR. OLIVER: And Your Honor, under what
23 circumstances would you say that they open the
24 door? What would they have to say?

25 THE COURT: I don't know. I can't tell you

1 that. I will sit here and listen to the case as
2 I'm signing orders and you all think I'm not paying
3 attention but I am, and I think it's really not for
4 me to say. I think it's for you to flag it.

5 And then you will -- I will take a break. Why
6 do you think they opened the door? You will tell
7 me -- and I may even say, can you read that back to
8 me, please? I will then make a decision as to
9 whether or not the door was opened or it wasn't.

10 I will say that when you open the door, I
11 allow them to drive a Mack truck through it because
12 I think if you think you're going to open the door,
13 I think you should say, Judge, can we have a
14 moment? And I don't do lots of moments, by the
15 way. That's the other thing. I don't try cases
16 by, "Can I have a moment?" Because that's why
17 trials end up being three weeks long.

18 But if you actually are really concerned, hold
19 off in asking that line of questions until you can
20 get to the Court and say, Judge, we just need
21 guidance. I plan on asking this, but I don't want
22 to open the door, okay?

23 That way I will tell you I think if you ask
24 that question, you are opening the door. You
25 choose how you want to proceed.

1 MS. SCOTT: We appreciate the guidance, Your
2 Honor.

3 MR. OLIVER: Your Honor, I want to put
4 something on the record because I knew I had a case
5 here, and this is simply not it. It's actually
6 67 So.2d 220 from 1953 from the Florida Supreme
7 Court.

8 THE COURT: You said 1953?

9 MR. OLIVER: Yes, Your Honor. Anyway, I just
10 wanted that on the record because we put it in our
11 papers and my notes on the case -- I am
12 paraphrasing this -- suggest that evidence of the
13 same or similar defect are relevant whether before
14 or after the plaintiff used the product, right, and
15 I think that goes to defect.

16 I think the fact that they pulled it off the
17 market goes to the consumer expectations test
18 because that's how we prove defect.

19 THE COURT: And I disagree with you. You
20 don't know why they pulled their product. You want
21 the jury to assume that the reason why they pulled
22 their product was because of a defect.

23 They could have realized that the liability
24 associated with having to defend all of these cases
25 that could come and so forth is greater than the

1 money they were going to make from selling the
2 product, and it didn't necessarily mean -- people
3 make business decisions all the time and I'm not
4 sure whether or not we can speculate as to why they
5 did.

6 Now, if you have a smoking gun, you have a
7 document from them that says: There's too much
8 asbestos in our product, there is no way for us to
9 manufacture this the way we need to, we've got to
10 stop manufacturing it, we are killing too many
11 people.

12 MR. OLIVER: Unfortunately, I don't have that.
13 That would be a great case though.

14 THE COURT: Of course you don't. We've got to
15 stop.

16 All right. Let me tell you all, I'm going to
17 do this because I want to give you the layout for
18 Monday. Okay. We have two hundred jurors coming
19 in. The plan is we don't have the courtroom for
20 the entire trial, just to let you know. We have
21 the courtroom for jury selection.

22 So if you have people, logistic people, who
23 are assisting you during the proceedings, they
24 should set up here in this courtroom. They can set
25 up starting Monday. I don't think there is anybody

1 using the courtroom. They can come and they can
2 set up their screen, the equipment and the like.

3 When you arrive on Monday, the first thing you
4 should do when you sit at the lawyers' tables, you
5 should situate yourself so that your back is to the
6 Court, to the bench, because the jurors are going
7 to be this way and I'm going there. You want to be
8 facing them, you don't want to be facing me.

9 We are going to bring in the jurors. We'll go
10 through the -- we'll bring 50 at a time and we'll
11 tell them -- we'll question them only as to time,
12 how long the trial is going to take.

13 Of the 50, we may get ten, may get 20, I don't
14 know. We send the ones that cannot stay away; we
15 keep the other 20. And we do that until we get
16 about 60, 70 jurors that you all can then question,
17 okay?

18 I ask questions, and then after I'm done
19 asking questions, I let you all ask questions, and
20 we obviously do this until we have a jury.

21 I'm curious, how many strikes per side?

22 MR. OLIVER: Three is what defendants have
23 said before.

24 THE COURT: Perfect.

25 MS. DILOMBI: Alternate strike.

1 THE COURT: I'm sorry?

2 MS. DILOLOMBI: "Alternate strike" was all I
3 said, Your Honor. Hassia Diolombi for J&J.

4 THE COURT: You said what, I'm sorry?

5 MS. DILOLOMBI: So three strikes for the main
6 panel and then one strike for the alternates?

7 THE COURT: Well, I give everybody one strike
8 per alternate. So if I choose three alternates,
9 you get three strikes for alternates, okay?

10 But when I say one strike per alternate, that
11 means if you don't use your strike on alternate
12 number one, you lose it. It doesn't carry to
13 alternate number two, okay?

14 All right, perfect. Our public relations
15 department sent me an email that they got a request
16 from -- is it CVN? They used to do my asbestos and
17 my tobacco cases. They are great because they set
18 up and you never know they're there. And they
19 don't say anything, they're quiet, they never
20 interrupt.

21 So I'm told that they are going to be setting
22 up probably on Tuesday or Wednesday, whenever we
23 start going the opening statements.

24 MS. BROWN: Your Honor, could I just say one
25 thing about CVN? They have videoed a bunch of

1 these. Our only request would be that the Court
2 would instruct counsel not to refer to the fact
3 that it's being recorded.

4 THE COURT: You mean to the jury?

5 MS. BROWN: Correct.

6 THE COURT: Oh, absolutely.

7 MR. OLIVER: I'm not going to do that.

8 MS. BROWN: Thank you, Your Honor.

9 THE COURT: No one should make reference.
10 They are like a little fly on the wall that we see
11 but we don't see.

12 MS. BROWN: Thank you.

13 THE COURT: The other thing is that -- and
14 this is important. I need you all to please,
15 please, please pay attention to what I'm about to
16 say. It will make your experience here a lot
17 better.

18 You all see that I'm probably not your typical
19 judge, and I'll accept that, okay, and I take pride
20 in that. I'm very direct. When I really am
21 comfortable with what I know what I'm doing, you
22 are just going to get rulings, okay?

23 You may just know deep in your heart I'm
24 wrong. You are saying the judge is just wrong and
25 you just need to tell me that I'm wrong, but I'm

1 not giving you access to me. You're saying, Judge,
2 I need a sidebar. Denied. Judge, I really need a
3 sidebar. Denied, next question.

4 Just stay calm, okay? The world is not going
5 to open up. We won't release the witness, and the
6 first opportunity that you have to bring it to my
7 attention, if I'm really wrong, I'll correct it.
8 Put the witness back on the witness stand.

9 And normally when I say "wrong," I wasn't
10 allowing the witness to do something that you
11 thought I should allow the witness to do. When I
12 get the opportunity, I will correct myself if I'm
13 wrong and I'll say call the witness back, and I'll
14 simply tell the jurors, ladies and gentlemen, we
15 have a couple more questions for this witness,
16 okay?

17 What you cannot do is you cannot attempt to
18 argue with me on the record. Trust me, it's not
19 something you want to do.

20 You are allowed to object. Hearsay,
21 relevance, asked and answered, that type of thing.
22 That's your objection. Your objection should not
23 be, Judge, she is not qualified to say that, she's
24 only a pharmacist, you know. Judge, objection,
25 Judge, counsel knows better than that. He knows

1 the witness didn't say that, okay?

2 Those are speaking objections, and you get one
3 warning, and then after I give you one warning, I
4 will give you a speaking response in front of the
5 jury, okay? And so I don't want to become a part
6 of this trial, but the good thing about me is if
7 you invite me in, I come willingly, okay?

8 So if you don't want to me to be a part of the
9 trial, I'll just sit up here and say overruled and
10 sustained while I'm signing my orders, doing what
11 I'm doing. It becomes your case, you get to try
12 your case.

13 But if you invite me, I'm telling you -- and
14 you all probably get a sense of it -- and I just
15 tell you what I think, okay? And I prefer not to
16 do that.

17 The other thing is that I take very few
18 breaks, sidebar breaks, okay? If you need a
19 personal break, you just need to say, Judge, can we
20 take a personal break at this time.

21 When we take a personal break, everybody has
22 to take a personal break at the same time. I'm not
23 taking a personal break at 9:00 and then taking
24 another one at 10:00, okay? If you have some
25 personal situation, you have to eat at a certain

1 time, you have to go to the bathroom at a certain
2 time because you have certain personal issues, I
3 don't need to know the specifics of it, but I need
4 to know you have that personal issue, because if
5 you need to take a break and I'm denying you the
6 break, but you really need to go, I need to know
7 that so that I am sensitive to the fact that you
8 have something personal and I'm not just denying it
9 because I have a stronger bladder than you do.

10 MR. OLIVER: Judge Thomas, at this time, I
11 would like to let you know that my client does have
12 one of those issues and it's serious. He has
13 Crohn's disease. He has advised me that there will
14 be times during this trial that he will have to
15 leave and go to the bathroom. I'm sure you're
16 familiar with the condition.

17 THE COURT: In that situation, it will be
18 brief situations, and by the way, we'll let the
19 jurors know there are times when the lawyers or the
20 parties may have to exit the courtroom temporarily,
21 but that has nothing to do -- it's more personal
22 and we'll come up with some language so that there
23 is no negative inference from that. And obviously,
24 the Court takes no -- if your client needs to
25 leave, personal representatives need to get up and

1 leave, they can get up and leave. Half the time, I
2 don't even know they're there, except when they're
3 called to testify.

4 And we take breaks every day -- and I'm saying
5 this to the plaintiff because you start off first.
6 Every day, we take breaks at the same time. We
7 take lunch at 1:00 every day, we take 45 minutes to
8 an hour for lunch. Every day, we will break around
9 4:30, 5:00. That may be adjusted depending what's
10 going on with the jurors or what's going on with
11 the Court, but you should have witnesses available
12 and ready to go up to and including 5:00.

13 What I suggest you do, if you have deposition
14 testimony, you hold onto it, keep it in your pocket
15 so that if you fall short of a witness and you need
16 to fill the time, you can read a deposition or play
17 a video. That kind of gives you cover.

18 But please don't put me -- please don't put me
19 in a position where it is 3:00 and you tell me,
20 Judge, everything is going faster than anticipated.
21 We don't have a witness. If you test me, I will
22 rise to the test, okay? I am telling you, you need
23 to have witnesses. You've got to fill that time.
24 I'm only looking at the plaintiff because obviously
25 the pressure is on you because you go first.

1 And at the end of every day, I say to the
2 plaintiff: Who are you calling next? That gives
3 you, the defense, an idea of who you need to
4 prepare for, and then when they're done, you will
5 know when to start lining up your witnesses and
6 have witnesses and have people here, okay, so
7 there's no break.

8 Judge, they finished earlier than we expected,
9 we don't have anybody here until Thursday, okay,
10 that's a problem. And I'm telling you all, it's a
11 problem. And I'm not recessing. I'm going to say
12 call your next witness. Judge, we have nobody.
13 Unfortunately, we need access to the record. You
14 have access to the record.

15 And you can move for a mistrial. And if you
16 move for a mistrial, whoever causes the mistrial
17 will be responsible for all the fees associated
18 with the other side's preparation of the case if
19 it's your fault for the mistrial.

20 If the jurors are responsible for the mistrial
21 or the Court is responsible for the mistrial, no
22 harm, no foul. If you are responsible for the
23 mistrial, I will immediately after the end of the
24 trial issue a rule to show cause as to why you
25 should not be responsible for paying all of the

1 other side's attorneys' fees and costs for
2 requiring this Court to grant mistrial.

3 And I will have an evidentiary hearing, I will
4 make my findings, and you can take it to the Third
5 District Court of Appeal or whoever else you need
6 to take it to if you disagree with the findings
7 that I've made. In other words, you probably don't
8 want a mistrial.

9 And by the way, mistrial includes doing
10 something that I told you not to do that you did
11 and the other side is forced to ask for a mistrial,
12 okay? You all know what it costs to get this case
13 where it is. Nobody wants to have to do the case
14 all over again. Let the jury make a decision on
15 the merits.

16 And that includes, by the way, if you don't
17 like the way the case is going. Sometimes,
18 strategically, people want to kind of say, yeah,
19 let's do this again. This is not coming out the
20 way I want it to come out, and so they kind of
21 incite a mistrial. I'll go with you, but there are
22 consequences if you invite a mistrial. I'm just
23 letting you all know that.

24 This is just me -- I don't know if this is a
25 suggestion. I try not to get involved if there is

1 no objection. I'm assuming if there is no
2 objection, everybody is okay with the testimony
3 coming in. If there is an objection, I'll rule on
4 it.

5 But sometimes y'all don't object when y'all
6 should be objecting, okay? And there is only so
7 much I can take of it. So what I will then do is
8 send the jury out and I will say, what are you
9 doing? I won't do it in front of the jury, but
10 I'll send the jury out because I don't understand.

11 Judge, there is no objection. I know there is
12 no objection, but under what rule of evidence are
13 you allowed to do that? I'm not sitting here
14 letting you -- ba, ba, ba, ba, ba. That's my
15 guidance to you. It will never be in front jury,
16 but when it happens, sometimes you're wondering
17 what did I do, what exactly just happened? And I'm
18 letting you know what just happened, okay?

19 I'm trying to think of something else that you
20 all need to know. Before closing arguments, I need
21 you all to let me know how much time you're
22 requesting for closing arguments. I don't
23 necessarily give you the time that you're
24 requesting; I give you the time based upon the
25 length of the trial, the complexity of the case.

1 And I will give you a reasonable amount of time,
2 but if you come in and you tell me, Judge, we need
3 six hours, I can tell you right now that's not
4 happening, but I will give you time that I think is
5 reasonable.

6 I think the law says that it can't be
7 arbitrary, it has to be based on the complexity of
8 the issues that the jury has to decide, as well as
9 the length of the trial, how many witnesses
10 testified and the like. And so hopefully you all
11 will be reasonable. And if you are reasonable, I
12 will try to be equally as reasonable.

13 Do you all have any questions that you want to
14 ask me?

15 MR. OLIVER: Do we have forty-five minutes, an
16 hour for opening?

17 THE COURT: I think that's fair.

18 MR. OLIVER: And then Your Honor, one of the
19 things that's important here, you said we need to
20 have deposition testimony ready to go and we'd like
21 to do that, but we need to figure out how to submit
22 this all to you.

23 THE COURT: Submit what to me?

24 MR. OLIVER: The deposition designations.

25 MS. STEMKOWSKI: How do you want to hear

1 objections, Your Honor? If we can't settle
2 something between ourselves, how would you like us
3 to present that you, before the jury, after the
4 jury?

5 THE COURT: I think what we do is on Monday,
6 you all should give me the actual transcript, I
7 want you to highlight -- I don't care who made the
8 objection. It doesn't matter to me who is
9 objecting, I just want to know the objection.

10 So what you do is you highlight the objection,
11 tell me what the objection is, and then I will go
12 through those while you're doing your jury
13 selection and I will do the best I can to rule on
14 them, and anything that I was unable to rule on
15 because I don't understand it, I need
16 clarification, then those will be the ones we can
17 take up at the end of the day so that you all can
18 then cut the video or edit the transcript as is
19 necessary. But I just need the transcript, I need
20 it to just be highlighted, and I will then say
21 overruled or sustained.

22 MR. OLIVER: And how much time will we get
23 with the panel during the voir dire?

24 THE COURT: How much time do you want?

25 MR. OLIVER: As much as I'm entitled to, Your

1 Honor. I'm committed to getting it all done at the
2 end of the day on Monday, but I would like at least
3 an hour and a half, if not two hours with the
4 panel.

5 MS. BROWN: Your Honor, can I make a
6 suggestion as to that? Would it be possible -- I
7 know Your Honor looked at the questionnaire we
8 jointly submitted and you had no objections to the
9 substance. I've tried eight of these cases now,
10 and my experience has been with these
11 questionnaires that the actual open panel voir dire
12 is much more productive if we do have some
13 information from them in advance.

14 Would it be possible to have them fill out the
15 questionnaire or a portion of the questionnaire
16 before we --

17 THE COURT: They will have a questionnaire.
18 You will get the questionnaire today. Hopefully
19 you will get that questionnaire today. Let me get
20 Brandon.

21 They normally send out the questionnaire the
22 business day before, but sometimes -- so you should
23 get the questionnaires and have them in your
24 mailboxes, if they are not already there.

25 Did we get the question mares from jury pool?

1 THE BAILIFF: Not yet, Your Honor.

2 THE COURT: Can you call them and ask them
3 when will we be getting the questionnaires?

4 THE BAILIFF: Definitely, Your Honor.

5 THE COURT: Thank you.

6 So he is going to call. Hopefully you'll get
7 them today so you'll have them all weekend. Now,
8 those questionnaires are not as helpful, they are
9 just very basic. They just say have you ever
10 served on a jury, you know, what do you do for a
11 living, spouse, do you have kids, any legal
12 experience, medical experience. You know, it's
13 just basic type of thing.

14 But just so that you all know -- and I'm
15 saying this because I'm so much more direct than
16 y'all are, y'all are up there and you don't want to
17 offend anybody, I'm not as concerned about that.
18 So I will go through a lot of what's on your
19 questionnaire before you all even get up there.

20 MS. BROWN: Okay.

21 THE COURT: I'll knock it out, it's almost
22 going to be like rapid fire, so hopefully you'll
23 have enough people taking notes. And I'm going to
24 tell them I'm asking all of you the same question.

25 So, for example, I have your questionnaire

1 here, and one of the first questions is -- I'm not
2 going to ask have you ever been in the military.
3 Let me ask something really important. To your
4 knowledge, have you or a family member ever used
5 talc, okay, and I'll just go down every single
6 person. I'll say first row; in the first row, how
7 many people if your family members have ever used
8 talc?

9 And because the room is a little bit bigger, I
10 may ask them to stand up or we may have a
11 microphone, they will answer the question, I go to
12 the next one, and by the time we get to the end,
13 they'll know what we're doing.

14 MS. BROWN: Is it paddles with numbers?

15 THE COURT: No, we are not as sophisticated
16 with the paddles yet. And I actually have a
17 fill-in bailiff and no JA, so we are really going
18 to be a little disjointed on Monday.

19 MS. BROWN: The jurors will say their number,
20 is that how it will work?

21 THE COURT: Yes. Well, just so that you know,
22 the first group that comes in, we are really
23 bringing them in hopefully in the order that they
24 appear on the sheet, but the only purpose is for us
25 to just line them up just to get enough jurors that

1 you can question, and then those jurors would again
2 be in order based upon the sheet.

3 I really don't even care how they come in, the
4 first 50, I just need to know, okay, you can't be
5 here, get them out, get enough so you all can
6 question them. Because if we spend all the time
7 lining 200 jurors up, sometimes that becomes --
8 that takes 45 minutes. Why?

9 We don't need -- we just need to know they're
10 here. Get them in, who are you, can you stay, can
11 you not stay, and then the people that we
12 ultimately want to question, we will then line
13 those up in the order that they appear on the sheet
14 that you will be given.

15 We normally give a sheet, but unfortunately, I
16 don't think we're going to be able to do it this
17 way because I don't have a JA. It normally has all
18 the jurors across in the order that they are
19 seated. We probably won't be able to do that.

20 Any other questions?

21 MS. BROWN: I have two. Number one, will you
22 hardship for a two-week trial or a three-week
23 trial? I know we have a dispute on how long this
24 will take.

25 THE COURT: You're telling me it's going to

1 be --

2 MS. BROWN: I say two, Judge. I've done these
3 in seven days.

4 THE COURT: You've done these in seven days?

5 MS. BROWN: With this firm, yes, South
6 Carolina.

7 MR. OLIVER: Your Honor, they did a
8 mesothelioma trial in a totally different situation
9 than this. It was not an ovarian cancer trial, so
10 it's a different case. We've said this is a
11 three-week trial all along. We've looked at our
12 calendar and I think at some point Your Honor asked
13 us when we were going to finish and we told you, I
14 believe, that it was going to take us -- we sent an
15 email to Andrew, went back and forth.

16 So we still think it's going to take three
17 weeks, that's our best estimate. That includes
18 time for them. Our part is not going to take three
19 weeks.

20 THE COURT: Well, here is what I think we
21 should do, because I also am suspect of three
22 weeks.

23 MR. OLIVER: We have a holiday in there too,
24 Judge.

25 THE COURT: You have one day. But I also

1 suspect it's not going to be three weeks, but the
2 problem is: What happens if it is, and then a
3 juror cannot stay?

4 Now, the option is that I think we tell the
5 jurors that the Court -- I say the Court -- the
6 Court anticipates being able to complete this trial
7 in two weeks, but it may -- there may be some
8 situations where it may go over, so we need to know
9 your availability for the next three weeks, okay?
10 That way if somebody has a hardship on the third
11 week, that doesn't automatically disqualify them,
12 but we may have to pick an alternate for everybody
13 that has a concern for the third week so we can
14 have somebody to replace. So instead of normally
15 three alternates, we may want to take five or six
16 alternates so we cover for any lag if we don't get
17 it done in two weeks.

18 And by the way, the other thing -- and I'm
19 concerned about this and I'll let you all tell me
20 how you feel about it. Whenever you all tell me
21 that the case is going to be three weeks, that
22 causes me to work harder during the day. I cancel
23 my motion calendar because you see how motion
24 calendar goes. It can be like two and a half
25 hours.

1 I cancel motion calendars and I just simply
2 say I'm just going to focus on this trial, which
3 means we are starting every day at 8:30. And I
4 tell the jurors that; look, folks, we've got to
5 start at 8:30 just so we're here.

6 You know, I tell my little one, unfortunately,
7 you've got to go to the library because I'm going
8 to pick you up at 5:00 rather than picking you up
9 at 4:30. And we just work longer.

10 The concern I have is that some of the
11 evidence in this case can be a little bit
12 challenging for jurors to sit here for seven hours
13 to receive it. And that's my concern.

14 If this was just an automobile accident case
15 where I say, no, I want to get it done, I may be
16 able to work those hours, but because of the
17 breadth of the testimony, it may be a little more
18 challenging to have people sit there. Because I'm
19 not sure how much of it is going to sink in if
20 you're just sitting here for too long of a time.
21 At some point, you may start daydreaming.

22 But I'll let you all tell me what you feel
23 about that. And maybe it depends upon how the case
24 is going, you know, because as the case proceeds,
25 within two or three days, you'll have a better

1 sense of is it closer to the ten days or is it
2 closer to the third week.

3 MR. OLIVER: And from plaintiff's perspective,
4 since we are obviously going first, Your Honor, I
5 can make a commitment that after the first three
6 days, after we've put on two witnesses, I'm more
7 than happy to report back to you and say we think
8 this has changed or we think we're right on track
9 and it's taking as long as we think it's going to
10 take.

11 THE COURT: Or we're behind.

12 MR. OLIVER: Absolutely. I'm going to tell
13 you whatever is happening.

14 THE COURT: All right. Do you have anything
15 else?

16 MS. BROWN: Just one more, Your Honor. In
17 terms of use of documents in opening, is it a
18 situation where it's okay to show documents we have
19 a good faith basis to believe will come into
20 evidence --

21 THE COURT: You do.

22 MS. BROWN: -- and we do so at our own peril?

23 THE COURT: Well, it's not at your own peril.
24 Here is what I require for opening: I require you
25 to show any documents you intend to use during

1 opening to the other side. The other side then has
2 an opportunity to object to those documents prior
3 to the opening.

4 If they do not object prior to the opening, I
5 do not break. So if you're 20 minutes into your
6 opening, and all of a sudden, you put a document up
7 and the other side says objection, I'm going to say
8 overruled.

9 And the reason why I'm saying that is -- now,
10 that's assuming you put on the record, Judge, we've
11 complied with your requirement, we showed the other
12 side our PowerPoint presentation, our documents.
13 They have lodged no objection. Once you do that,
14 as far as I'm concerned, you satisfied any
15 obligation, and if they slept on it, they just
16 slept on it and we just proceed and I'm not
17 breaking up an opening statement because someone
18 decides to object at the eleventh hour to a
19 document.

20 MR. PENDELL: Your Honor, may I ask a
21 question? Is that rule just for opening?

22 THE COURT: As compared to what?

23 MR. PENDELL: In other words, do I have to
24 somehow a document before I have a witness on the
25 stand?

1 THE COURT: You have to show the document to
2 opposing counsel --

3 MR. PENDELL: Here in court.

4 THE COURT: -- before you show it to the
5 witness.

6 MR. PENDELL: But not prior to that time?

7 THE COURT: You all should have had a
8 meet-and-confer. Hopefully you're say staying at
9 the same hotel. Your meet-and-confer should have
10 been: Here are all the documents I intend to
11 introduce, what is your objection? Which ones do
12 you object to?

13 If there is no objection, then you should mark
14 the document -- all your documents should be
15 premarked and given to Rod at the beginning of the
16 trial. But you should then mark -- the document
17 should be handed to Rod so that Rod has the
18 documents and he can mark them, and documents that
19 you object to because predicate or something along
20 that line, then you don't -- obviously you have to
21 lay the predicate and then you would make a
22 contemporaneous objection if you believe that the
23 predicate hasn't listen laid, and then will I rule.

24 But all your documents have to have been
25 reviewed because there is nothing more painful in a

1 case like this when you all are all of a sudden
2 saying I've never seen that document. They didn't
3 put that on the witness list, okay? Those things
4 are problematic.

5 MS. BROWN: And I'm happy to confer with
6 counsel. I have some ideas of how we've done it in
7 the past. If we exchange direct documents a
8 sufficient time in advance, I've found we are able
9 to work this all out without what Your Honor is
10 contemplating.

11 The one thing I do want to clarify with the
12 Court is that documents we are going to use on
13 cross, we of course don't need to show to the other
14 side before cross-examination, right?

15 THE COURT: Well, not before, but when you go
16 to approach the witness, you need to show the
17 document.

18 MS. BROWN: I understand, Your Honor.

19 MR. PENDELL: Your Honor, just to clarify
20 because I heard opposing counsel say something
21 that's different, which is why I asked the
22 question.

23 In general, we have an exhibit list. We are
24 to exchange exhibit lists, say whether we have
25 objections to certain documents and make them

1 before the trial starts so we know ahead of time
2 what everybody is doing. That is different than I
3 have this doctor who is going to testify tomorrow,
4 and here are the document five specific documents
5 off that list that I'm going to use with him.

6 THE COURT: No, no.

7 MR. PENDELL: Okay.

8 THE COURT: I do not require you to, in
9 advance, give the specific documents that you're
10 going to use for a witness in advance. I just
11 require you to have the conversation about all your
12 exhibits, but no, you don't have to identify
13 specific documents you're going to use with each
14 witness.

15 MS. BROWN: The reason we've done it in the
16 past, Your Honor, like the night before, you send
17 the ten documents you are going to put the doctor
18 on direct is because our exhibit lists are like
19 thousands of documents, and so that's been my
20 experience.

21 THE COURT: I will say this: I do not require
22 it, but I will encourage it.

23 MS. BROWN: It just makes it easier, but I'll
24 confer with counsel and see what we can do.

25 THE COURT: And obviously what applies to one

1 would apply to the other.

2 Any other questions?

3 MR. OLIVER: Anybody on my team?

4 MS. BROWN: Last one. You would anticipate
5 opening Tuesday? Monday would be all jury
6 selection?

7 THE COURT: What we will do is we will do
8 Monday all jury selection, and if for some reason
9 we do finish a little earlier, maybe we can take up
10 some of these extraneous issues that we haven't
11 resolved today. So yes, don't plan on opening on
12 Monday, just plan on jury selection, and then
13 anything else that's remaining that we need to talk
14 about.

15 MS. BROWN: Thank you, Your Honor. We
16 appreciate that.

17 THE COURT: Anything else?

18 MR. OLIVER: Thank you, Your Honor.

19 MS. SCOTT: Thank you, Your Honor.

20 (The hearing was concluded at 4:37 p.m.)
21
22
23
24
25

1 HEARING CERTIFICATE

2
3 I, CHRISTINE SAVOUREUX-MARINER, Florida
4 Professional Reporter, certify that I was authorized
5 to and did stenographically report the foregoing
6 proceedings and that this transcript is a true
7 record of the proceedings before the Court.

8 I further certify that I am not a
9 relative, employee, attorney, or counsel for any of
10 the parties, nor am I a relative or employee of any
11 of the parties' attorney or counsel connected with
12 the action, nor am I financially interested in the
13 action.
14

Dated this 11th day of February, 2024.

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CHRISTINE SAVOUREUX-MARINER

18 Florida Professional Reporter
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	00002 137:7	10020 3:22	1974 178:14,18
	01 1:3	1006 188:20	1975 179:11,11 179:14
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